STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Bahrey, Jr.,
Petitioner,

vs.

NO: 10 WC 11460

14IWCC0181

ATMI Precast Company,
Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, temporary total disability and permanent disability benefits and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's conclusion that Petitioner's current condition is causally related to the March 1, 2010 accident. However, the Commission bases it causation opinion on the chain of events rather than the causation opinions of Drs. Kim and Gleason. The Commission finds that the medical opinions of Drs. Kim and Gleason are insufficient to support a causation opinion as they both lack a sufficient understanding of Petitioner's work duties as well as an understanding of the time period the conditions manifested themselves. The Commission finds that the chain of events supports Petitioner's position that his condition arose from his employment on March 1, 2010. Therefore, the Commission affirms the Arbitrator's conclusion regarding causation but provided a different basis in which to support the same.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 21, 2013 is hereby affirmed and adopted with the exception of the comments noted above.

14IWCC0181

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit in the amount of $1,127.90 under Section 8(j); provided that Respondent shall hold Petitioner harmless from any claims or demands by any providers of the benefits for which Respondent is receiving credit under this order.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014

MB/jm

O: 1/16/14

43

Mario Basurto

David L. Gore

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

BAHREY, JOHN S JR
Employee/Petitioner

Case# **10WC011460**

14IWCC0181

ATMI PRECAST CO
Employer/Respondent

On 2/21/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.13% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0190 LAW OFFICES OF PETER F FERRACUTI
JENNIFER KIESEWETTER
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

0075 POWER & CRONIN LTD
DANIEL ARTMAN
900 COMMERCE DR SUITE 300
OAKBROOK, IL 60523

STATE OF ILLINOIS)
)SS. 14IWCC018
COUNTY OF KANE)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
CORRECTED

JOHN S. BAHREY, JR.
Employee/Petitioner

v.

ATMI PRECAST CO.
Employer/Respondent

Case # **10** WC **11460**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gregory Dollison**, Arbitrator of the Commission, in the city of **Geneva, IL**, on **11/8/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] What temporary benefits are in dispute?
   [ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [ ] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

FINDINGS 14IWCC0181

On the date of accident, **3/10/2010**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $**78,705.12**; the average weekly wage was $**1,513.56**.

On the date of accident, Petitioner was **62** years of age, ***married*** with **0** dependent children.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**1,127.90** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1009.04/week for 47 weeks, commencing 5/27/10 through 4/20/11, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services of $151,829.30, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72/week for 225 weeks, because the injuries sustained caused the 45% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

2/15/13
Date

FEB 21 2013

ICArbDec p. 2

STATEMENT OF FACTS

Petitioner began working for ATMI Precast in 1972, but at that time the company was known by a different name. Petitioner testified that he worked various jobs during his time with ATMI, including laborer, brick layer, and erecting precast. Petitioner started erecting precast in 1978. Precast slabs are made of concrete about 12 feet wide and 40 feet tall and must be welded together to make a building. Petitioner testified that a four man crew would work together to assemble these panels. Petitioner had to climb up on a truck, put lifters on a concrete slab, and then jump off the truck repeatedly during the work day. Petitioner testified that in order to get on the truck, he would climb the wheels of the truck to get in the trailer and then would jump down about a distance of four feet. He would also have to get in and out of the footing four foot deep in the ground. Petitioner testified that he would climb up the truck and jump off approximately 25 times a day, as well as jumping down into the footing and climbing back out around 25 times a day. Petitioner was involved in welding the bottom of the concrete to the footing. He would have to climb up the wall in order to install the pole braces, which each weighed over 100 pounds. Petitioner testified that he would set up on average 25 panels a day.

Petitioner testified that in 2000, he began working on repairs rather than erecting precast. This involved climbing the ladders, sticking concrete under the panels, cutting holes in the panels, and jumping in the footing four feet deep in the ground.

Petitioner testified that he never had any problems with his hips prior to beginning work for ATMI Precast. He further stated that he has had pain in his hips the last 12 years, which became progressively worse.

Petitioner saw his primary care physician Dr. Sifatur Sayeed on January 10, 2007, and complained of left hip pain. (PX4 at 1). Petitioner had started physical therapy for his left hip pain. (PX4 at 1). On May 23, 2007, Petitioner saw Dr. Sayeed for his hip pain and indicated he was unable to do regular exercise because of it. (PX4 at 9). Dr. Sayeed assessed him as having left hip pain, secondary to severe degenerative joint disease in both hips. (PX4 at 10). On April 23, 2008, Petitioner was again assessed as having degenerative joint disease of his left hip. (PX4 at 12). An examination on February 2, 2010, revealed Petitioner had bilateral hip joint pain. (PX4 at 16).

Petitioner testified that the last day he worked with ATMI was November 24, 2009 as a result of a layoff. Petitioner testified that he officially retired with ATMI Precast on March 1, 2010 because he could no longer do the job. He could not bend over to put the pole braces in and he had difficulty climbing the ladder.

Petitioner testified that he told supervisors Jim Armbruster and Bob Hayden about his hip pain.

Dr. Andrew Kim, board-certified orthopedic surgeon of M&M Orthopaedics of Naperville, Illinois, testified via evidence deposition on August 4, 2011. (PX3). Petitioner first saw Dr. Andrew Kim on March 10, 2010. At that time, Petitioner was complaining of pain in both hips, the left hip worse than the right at that time. (PX3 at 4). X-rays showed decreasing joint space of both hips and signs of moderate to severe arthritis of both hips. Dr. Kim recommended a total hip replacement for his left side. (PX3 at 5).

On March 24, 2010, Petitioner again saw Dr. Sayeed for right hip pain and reported the severity to be at a 5 to 8 on the pain scale. (PX4 at 24). Petitioner described the pain as sharp, radiating to his right leg, and getting worse with moving. (PX4 at 24).

On his next visit with Dr. Kim on May 19, 2010, Petitioner was having more pain in his right hip and wanted to switch sides and have his right hip replaced. (PX3 at 5). Dr. Kim testified that in his opinion both hips needed to be replaced. (PX3 at 5).

On May 21, 2010, Dr. Sayeed cleared Petitioner for the right hip replacement, indicating that he was medically stable for the procedure. (PX4 at 32).

On May 27, 2010, an anterior total right hip replacement was performed by Dr. Kim at Rush-Copley Hospital. (PX3 at 6). Dr. Kim described the surgery as one in which they cut almost no muscles. (PX3 at 6). In his post-surgical visits, Petitioner was doing very well. He complained mostly of left hip pain, but the right hip that had been operated on was doing quite well. (PX3 at 8).

On December 28, 2010, Petitioner was evaluated for an Independent Medical Evaluation by Dr. Thomas Gleason, a board certified orthopedic surgeon, who testified via evidence deposition on October 11, 2011. Petitioner complained of left hip and groin pain when he met with Dr. Gleason. Dr. Gleason described Petitioner as having a painful limp, favoring the left lower extremity. (RX1 at10). Dr. Gleason took x-rays which revealed a right total hip arthoplasty in satisfactory position and degenerative joint disease of the left hip, severe, with joint space narrowing, sclerosis, subchondral spur formation, and articular irregularity. (RX1 at12). Dr. Gleason further testified that Petitioner has a diminished range of motion with his left hip and an antalgic gait. (RX1 at13). Dr. Gleason found no causal relationship between Petitioner's hip conditions and his work. (RX1 at14). He further testified that a hip replacement is always related to the natural aging process and never because of a person's certain activity level. (RX1 at19). Dr. Gleason also testified that for patients who have bilateral hip arthroplasty, he would not recommend that they return to heavy work. (18).

On January 12, 2011, Dr. Sayeed cleared Petitioner for the left hip replacement, indicating that he was medically stable for the procedure. (PX4 at 51). On January 20, 2011, Dr. Kim performed an anterior total left hip replacement on Petitioner. (PX3 at 8). On his last visit with Dr. Kim on April 20, 2011, Dr. Kim discussed activity restrictions with Petitioner. Dr. Kim instructed Petitioner to avoid repetitive high impact exercises in order to prolong the life span of his implants. (PX3 at 9). Dr. Kim testified that running, jumping, and most sports activities would be discouraged on a permanent basis after a total hip replacement. (PX3 at 10). He indicated he would see Petitioner in two years, and that patients should follow-up after a total hip replacement every several years for an X-ray check. Dr. Kim testified that a hip replacement may last someone 20 years. (PX3 at 10).

Dr. Kim testified that heavy lifting and certainly jumping from three to four feet high 30 to 60 times a day is probably an aggravating factor in the progression of Petitioner's degenerative hip disease. (PX3 at 12). He elaborated that this is a repetitive trauma to the hip that could be and probably is a contributing factor to progression of arthritis. (PX3 at 12-13). Dr. Kim also testified that despite the Petitioner's work activities it was possible that Petitioner would have required hip replacement anyway. (PX3 at 18-19).

Petitioner testified that he currently has limitations walking and bending over as a result of his bilateral hip replacements. He also stated he cannot lift his legs up, but must pick up his legs in order to put socks on.

In support of the Arbitrator's Decision as to C. WHETHER AN ACCIDENT OCCURRED THAT AROSE OUT OF AND IN THE COURE OF PETITIONER'S EMPLOYMENT, the Arbitrator finds the following:

The Arbitrator finds that Petitioner sustained accidental injuries that arose out of and in the course of employment. Petitioner testified that he retired from ATMI on March 1, 2010, because he could no longer perform his regular job duties.

Petitioner testified that he had symptoms prior to March 1, 2010, for approximately twelve years, but that the pain in his hips became increasingly worse over time. Petitioner continued to work for Respondent, but he did discuss his hip pain with his primary care physician Dr. Sayeed.

Mr. Bahrey described working for Respondent for 37 years prior to his retirement on March 1, 2010. From 1978 to 2000, Petitioner described his position involving the erection of precast concrete slabs about 12 feet wide and 40 feet tall. Petitioner had to climb up on a truck, put lifters on a concrete slab, and then jump off the truck repeatedly throughout the day. Petitioner testified that in order to get on the truck, he would climb the wheels of the truck to get in the trailer and to get off he would jump down about a distance of four feet. He would also have to get in and out of the footing four foot deep in the ground. Petitioner testified that he would climb up the truck and jump off approximately 25 times a day, as well as jumping down into the footing and climbing back out around 25 times a day. Petitioner was involved in welding the bottom of the concrete to the footing. He would have to climb up the wall in order to install the pole braces, which each weighed over 100 pounds. Petitioner testified that he would set up on average 25 panels a day. Petitioner testified that in 2000, he began working on repairs rather than erecting precast. This job, although less physically demanding, still involved climbing the ladders, sticking concrete under the panels, cutting holes in the panels, and jumping in the footing four feet deep in the ground

Based upon the greater weight of the evidence, the Arbitrator finds that Petitioner suffered a repetitive trauma causing severe degeneration and arthritis in both hips arising out of his employment with Respondent which culminated and manifested itself on Petitioner's retirement date of March 1, 2010. It was that date upon which he determined that he could no longer handle performing his regular career and shortly thereafter he was referred for orthopedic care for the first time regarding his hip conditions.

In support of the Arbitrator's Decision as to E. WHETHER TIMELY NOTICE WAS GIVEN TO RESPONDENT, the Arbitrator finds the following:

Petitioner testified that he informed supervisors Jim Armbruster and Bob Hayden of his hip pain. Petitioner testified that Respondent knew of his bad hips. Petitioner testified that he retired on March 1, 2010, because he could no longer perform his job duties.

The notice requirement under the Act is liberally construed and does not require Petitioner to know medically exactly what his diagnosis is nor does it require Petitioner to have a specific incident described or fill out a specific incident report to constitute proper notice. Further, Respondent did not offer any evidence to rebut Mr. Bahrey's testimony that his supervisors knew of his hip problems and knew that he was having difficulty in the performance of certain aspects of the job due to his hip difficulties. Lastly, the Application for Adjustment of Claim was filed within 45 days of the accident date.

Based upon the greater weight of the evidence and the credible testimony of Petitioner, the Arbitrator finds that Respondent had proper notice under the Act.

In support of the Arbitrator's Decision as to F. WHETHER PETITIONER'S CURRENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, the Arbitrator finds the following:

The Arbitrator finds that Petitioner's current condition of ill-being is causally related to Petitioner's repetitive trauma at work.

Dr. Kim testified that heavy lifting and certainly jumping from three to four feet high 30 to 60 times a day is probably an aggravating factor in the progression of Petitioner's degenerative hip disease. (PX3 at 12). He elaborated that this is a repetitive trauma to the hip that could be and probably is a contributing factor to progression of arthritis. (PX3 at 12-13).

Respondent's IME, Dr. Gleason, on the other hand, testified that a hip replacement is always related to the natural aging process and never because of a person's certain activity level.

The Arbitrator finds the opinion of Dr. Kim to be credible. The Arbitrator finds that Petitioner provided sufficient evidence that his work activities over time contributed to and aggravated his condition, causing him to develop severe arthritis in both hips and requiring Petitioner to undergo bilateral total hip replacements. The Arbitrator finds Dr. Kim to be more credible than Dr. Gleason who appeared to be of the opinion that no type of activity would ever contribute to the need for a hip replacement but that rather it was always due to solely the age of the person.

In support of the Arbitrator's Decision as to J. WHAT AMOUNT SHOULD BE AWARDED FOR REASONABLE AND NECESSARY MEDICAL SERVICES, the Arbitrator finds the following:

Petitioner's Exhibit #1 is a compilation of itemized medical expenses related to Mr. Bahrey's hip care following his March 1, 2010 retirement. Included in the expenses are medical bills totaling $3,521.00 from Dr. Sayeed, with an outstanding balance of $2,467.95. A review of Dr. Sayeed's records and bills reflects the following:

3/02/10 - $100.00 charge – Petitioner seen for medication refill and blood work-up for diabetes.

9/27/10 - $175.00 charge – Petitioner seen for treatment of his diabetes, medication refill and for a flu vaccine.

10/25/10 - $410.00 charge - Petitioner seen for treatment of his diabetes and hypertension.

12/06/10 - $190.00 charge – Petitioner seen for flu and diabetes.

It is clear that at least $875.00 of Dr. Sayeed's charges are for treatment for Petitioner's personal medical condition and not related to this claim.

Thus, the Arbitrator finds that Petitioner shall be entitled to total medical expenses of $153,487.25 minus adjustments made by the workers' compensation carrier Gallagher Bassett Services, Inc. of $1,127.90 with Respondent to receive Section 8(j) credit for payments and adjustments of $530.05, leaving awarded to Petitioner $151,829.30 for his remaining reasonable, related, and necessary medical expenses subject to the limitations of the medical fee schedule of Section 8.2 of the Act.

In support of the Arbitrator's Decision as to K. WHAT AMOUNT OF TEMPORARY TOTAL DISABILITY BENEFITS SHOULD BE AWARDED, the Arbitrator finds the following:

Petitioner was released at maximum medical improvement by Dr. Kim on April 20, 2011. The Arbitrator finds that Petitioner is entitled to TTD from May 27, 2010 through April 20, 2011, representing 47 weeks. The Arbitrator notes that May 27, 2010 is the first day Petitioner was taken off work by any treating doctor.

Although Mr. Bahrey had retired from his employment, he would still be entitled to temporary total disability for the period that he would have been completely off work due to the surgical necessity. Petitioner is not alleging any temporary total disability beyond his release from Dr. Kim's medical care.

In support of the Arbitrator's Decision as to L. THE NATURE AND EXTENT OF THE INJURY, the Arbitrator finds the following:

Although Petitioner had already retired from his employment with Respondent on March 1, 2010, Dr. Kim testified that Petitioner would have to avoid any repetitive or high impact activity as a result of his bilateral hip replacements. Dr. Kim testified that running, jumping, and most sports activities would be discouraged on a permanent basis after a total hip replacement. Even Dr. Gleason, Respondent's IME, testified that he would not recommend that patients who have had bilateral hip replacements return to heavy work.

Based upon this, the Arbitrator concludes that Petitioner would not be able to return to his usual and customary employment. Petitioner's employment even in repairing and not erecting precast involved climbing and jumping – climbing up the truck and jumping off, jumping into the four foot deep footing, and climbing up and down ladders.

Petitioner has a 37 year history working for Respondent. Due to the repetitive trauma on his hips, Petitioner has lost his ability to perform his usual and customary occupation. Petitioner testified that he still has limitations in walking, bending over, and lifting his legs up.

Based upon the greater weight of the evidence, Petitioner's loss of ability to continue in his usual and customary occupation, and Petitioner's overall permanent restrictions, the Arbitrator finds that Petitioner is entitled to an award of 45% loss of use person as a whole pursuant to Section 8(d)2 of the Act.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse Causal connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LARRY HERMAN,

Petitioner,

vs.

NO: 10 WC 6182

WENGER TRUCK LINES,

14IWCC0182

Respondent,

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical expenses, and temporary total disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below but attaches the Decision for the purpose of the Findings of Fact which is made a part hereof but with the modifications noted below. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission disagrees with the Arbitrator regarding the weight given to the surveillance videos as they reflect on the credibility, or lack thereof, of the Petitioner in this case and also regarding the weight given to the opinions of Respondent's Dr. VanFleet. Petitioner's credibility is vital to his claim and we find that the surveillance videos undermine his own credibility and support the credible opinion of Dr. VanFleet. For the reasons outlined below, we find that Petitioner is not credible regarding the extent of his injuries, his complaints to his medical providers, and his current alleged symptoms.

On May 3, 2010, Petitioner saw Dr. DePhillips with continuing complaints of low back pain that "can reach a 10 on a scale of 1-10," which radiated into the buttock and down the anteroloateral thighs to the knees. Petitioner also complained of continuing neck pain, headaches, and radiating pain into the left arm. (Px5). On May 5, 2010, Petitioner canceled his

physical therapy appointment "due to [increased] pain." (Px4). On May 7, 2010, Petitioner told his therapist that he "hurt all over" and had level "6/10" pain. (Px4).

However, having been made aware that surveillance videos had been taken of him during this time period, Petitioner testified at hearing that he "was making a patio." (T.16). On cross-examination, Petitioner admitted that he planted flowers, shoveled dirt, carried a bench that weighed about 20 pounds, used a posthole digger to dig holes, painted, and mowed the grass. (T.31-33).

On May 5, 2010, the same day that Petitioner canceled his physical therapy appointment, the Petitioner is seen unloading what appear to be large stones/pavers and bricks from the back of a trailer. The Arbitrator mentioned the "unloading" but neglected to note that Petitioner was actually building the patio and engaging in physical activities that undermine Petitioner's physical therapy record that he had to cancel the appointment due to increased pain. Petitioner was carrying four to six "bricks" at a time, walking approximately 15 to 20 feet back and forth from the trailer to the "patio" area in front of his home and carefully placing each brick by bending over for extended periods of time and returning to an upright position with no apparent difficulty. Petitioner is seen leaning into the trailer with his arms outstretched to get the bricks. We note that Petitioner testified that these were actually one to two pound pieces of wood that were the size of bricks. (T.17). Whether these were bricks or pieces of wood, the video suggests that there were also larger, heavier materials that Petitioner lifted, such as larger stone pavers. Regardless, our decision in this case does not rest on whether the items were brick or wood but, rather, on the Petitioner's activities as a whole.

On May 7, 2010, after telling his therapist that he "hurt all over" and had "6/10 pain," Petitioner is seen bending over for an extended period while appearing to cut something with a saw, walking briskly, bending effortlessly while apparently planting flowers, digging with a long shovel and walking the shovelfuls of dirt to a nearby tree, and sweeping with a large broom. The Arbitrator's decision does not mention that videos also show that Petitioner mowed his lawn by hand while walking very rapidly and jogging at times, pulling and pushing the lawnmower very aggressively and at times with only one hand, turning and rotating his body and head with no signs of distress or difficulty, and bending over for extended periods.

On May 10, 2010, Petitioner returned to Dr. DePhillips and again complained of low back pain that could reach 10-out-of-10 that radiated into the lower extremities. Petitioner told him that he had no relief with the epidural steroid injections and failed to improve with physical therapy. Petitioner also complained of neck and shoulder pain and he was awaiting cervical injections with Dr. Patel. Petitioner was to remain off work.

On May 11, 2010, Petitioner was filmed filling a garbage can with water for about 30 seconds and then lifting and carrying it. He also spread grass seed, carrying a bench, bending for extended periods, painting boards in his garage, getting into his vehicle, driving, and walking up and down stairs. All of these activities are performed without any apparent difficulty or signs of distress. Yet, on May 12, 2010, Petitioner reported "8/10" pain to his therapist.

Based on our viewing of the videos, we find that the Arbitrator's depiction of Petitioner's activities is not accurate. We also note that the surveillance videos only show portions of the construction of Petitioner's "patio," but over the course of the several days, the area in front of Petitioner's house transforms from having several large wooden posts sunk into the ground to a full enclosure with wood lattice fencing. As such, we find that it is more likely than not that

Petitioner engaged in significantly more substantial physical activity than even what is depicted in the videos.

Petitioner's claims of pain to his medical providers are not supported by the level of physical activity depicted in the surveillance videos. This, along with the fact that Petitioner canceled his therapy appointment claiming he had increased pain but instead was building his patio, serves to greatly undermine Petitioner's credibility and causes us to find Respondent's Dr. VanFleet's opinion to be the most credible medical opinion in this case.

Petitioner was examined by Dr. VanFleet on June 15, 2010. Dr. VanFleet testified that Petitioner was very uncooperative during the examination. Petitioner told him that he did not feel that he was capable of any kind of activity. Petitioner wore sunglasses during the entire examination, refused to change into a gown, and actually spit on the examination table. Dr. VanFleet noted several Waddell's signs including very deliberate and exaggerated movements with a great deal of gasping. Petitioner wouldn't move his back, extend, or flex. Petitioner had superficial tenderness to palpation, and pain with simulated truncal rotation. Petitioner had "give way" weakness in all motor groups making strength testing impossible. Dr. VanFleet reviewed the cervical and lumbar MRI films and testified that they were of good diagnostic quality. He diagnosed cervical and lumbar degenerative disc disease with symptom magnificent and nonorganic pain syndrome.

Dr. VanFleet testified that nonorganic pain syndrome is when somebody has a plethora of symptom magnification signs and there is a possibility that this is a fabricated situation with no truly organic pain problem. He opined that Petitioner's lack of cooperation, exaggerated responses during examination, and the Waddell's findings are indicative of nonorganic pain syndrome. He opined that the prognosis is poor with patients in this situation because they "have an incentive not to get better." (Rx1 at 17). Dr. VanFleet testified that Petitioner's diagnosis of degenerative disc disease was certainly a pre-existing condition that predated the injury that he described. He felt that Petitioner's continuing complaints of pain are all based upon his own description and are entirely subjective without objective corroboration, which is contradicted by the nonorganic pain manifestations.

Dr. VanFleet testified that he issued a second report on July 12, 2010, after he reviewed surveillance videos from May 5, May 7, and May 11, 2010, and that Petitioner's activities depicted in the videos were "not at all" consistent with his behavior and physical examination one month later. (Id. at 19-22).

We also note that Petitioner's Dr. DePhillips testified on cross-examination that he had not seen the video surveillance tapes and that, if he had, it could change his opinion as to Petitioner's level of function and restrictions. (Px11 at 34-35).

Petitioner's alleged need for additional medical treatment and work restrictions rests entirely on his credibility or, in this case, the lack thereof. Based on the above and a review of the record as a whole, we find Petitioner to be not credible regarding the extent of his injuries, his complaints to his medical providers, and his current alleged symptoms. Therefore, we find that Petitioner failed to prove that he is entitled to temporary total disability or medical expenses after the date of Dr. VanFleet's report on July 12, 2010, and hereby modify the Arbitrator's decision to reduce the award of temporary total disability to 25-3/7 weeks for the period from January 16, 2010 through July 12, 2010. In addition, we modify the medical award to only award those expenses incurred through July 12, 2010, as Petitioner has failed to prove that the medical expenses incurred after this date were causally related to his work injury on January 15,

2010. We note that some of the medical bills incurred by Petitioner are not at issue and Respondent had already paid them. Of the remaining bills that were in dispute at the hearing and introduced into evidence, as represented by Petitioner's Exhibits 13 through 25, we find that the following were reasonable, necessary, and causally related to his work injury:

Peru Ambulance (Px13)		$ 810.50
Hospital Radiology (Px14)		580.00
St. Mary's Hosp. (Px16)		9,805.00
2/18 – 6/30/10 PT (38 x $170) = $6460		
3/1/10 Blood work = $659.00		
3/13/10 Lumbar MRI = $2486.00		
7/5/10 PT = $200		
Dr. George DePhillips (Px17)		710.00
3/10/10	$250	
5/3/10	$160	
5/10/10	$150	
7/12/10	$150	
Pain & Spine Institute (Px18)		15,325.20
3/22/10	$ 560.20	
4/8/10	$5277.50	
4/22/10	$4492.50	
5/14/10	$4200.00	
6/29/10	$ 795.00	
Illinois Valley Orthopedics (Px19)		95.00
6/17/10	$95	
Associated St. James Radiology (Px24)		451.00
2/19/10	$175.00	
3/13/10	$276.00	
Prescription medication (Px25)		421.36
1/16/10 through 6/29/10		
	Total:	$ 28,198.06

This results in a medical award of $28,198.06, which shall be paid pursuant to the fee schedule in Section 8.2 of the Act, and for which Respondent shall receive credit for any amounts already paid toward these disputed bills.

Finally, we vacate the Arbitrator's award of prospective medical treatment with Dr. Salehi.

14IWCC0182

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $236.12 per week for a period of 25-3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $28,198.06 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,200.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014

Charles J. DeVriendt

Michael J. Brennan

Ruth W. White

SE/
O: 1/28/14
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

HERMAN, LARRY
Employee/Petitioner

Case# **10WC006182**

WENGER TRUCK LINES
Employer/Respondent

14IWCC0182

On 1/24/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0400 DAVID W OLIVERO
1615 4TH ST
PERU, IL 61354

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
BRENT HALBLEIB
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

14IWCC0182

STATE OF ILLINOIS)
)SS.
COUNTY OF LASALLE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

LARRY HERMAN,
Employee/Petitioner

v.

WENGER TRUCK LINES,
Employer/Respondent

Case # **10** WC **6182**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **Ottawa, IL**, on **08/30/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

14IWCC0182

FINDINGS

On the date of accident, **01/15/10**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**2,480.36**; the average weekly wage was $**354.34**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $5,918.33 for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

THE RESPONDENT HEREIN IS ODERED TO PAY TO THE PETITIONER AND HIS ATTORNEY $40, 922.21 IN REASONABLE AND NECESSARY MEDICAL EXPENSES TO DATE OF HEARING UNDER SECTION 8(A) PER 8.2

THE RESPONDENT IS ORDERED TO PAY TO THE PETITIONER AND HIS ATTORNEY THE TEMPORARY TOTAL DISABILITY ACCRUED TO DATE FROM 1/16/10 THROUGH 8/30/12 OR 136&6/7TH WEEKS AT THE RATE OF $236.12 UNDER SECTION 8.

THE RESPONDENT IS ORDERED TO AUTHORIZE IN WRITING PROSPECTIVE MEDICAL TREATMENT UNDER SECTION 8(A) INCLUDING ALL MAINTENANCE PLUS PRE AND POST SURGICAL ANCILLARY CARE – TO PETITIONER AND DR. SEAN SALEHI OF NEUROSURGICAL SURGERY & SPINE SURGERY, S.C FOR THE HIS RECOMMENDED SURGERY IN HIS DEPOSITION , PX 1.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

#01 George J. Andros
Signature of Arbitrator

JAN 22. 2013
Date

ICArbDec19(b)

JAN 24 2013

STATEMENT OF FACTS 10 WC 06187

Mr. Herman testified at his arbitration hearing that he was hired as a truck driver by employer, WENGER TRUCK LINES, on November 22, 2009. He further testified that prior to his work injury on January 15, 2010, he had never had any type of low back injury, nor had he ever received any medical care to his low back.

On January 15, 2010, Petitioner was refueling his truck at a truck stop in Peru, Illinois. When he attempted to climb into the cab, he reached up to grab onto the steering wheel when his feet slipped on the steps, causing him to fall down the side of the truck. He fell to the ground in such a way that it caused his lower back to hyper-extend. He testified that his low back arched inward. Then he immediately experienced severe pain all over his body and had to be transported by ambulance to a local hospital, IVCH, for medical attention.

Hisl complaints at IVCH were of neck pain, shoulder pain and upper right arm pain. The x-rays taken of all those injured areas showed degenerative changes without acute findings. The emergency room physician discharged employee HERMAN with a diagnosis of cervical strain, bilateral shoulder strains and contusions. He was prescribed Vicodin for pain, Flexeril for muscle spasms and his right arm placed in a sling. The emergency room physician restricted him from work from January 15, 2010 to January 18, 2010 and also instructed him to call Dr. Mitchell of Illinois Valley Orthopedics for a follow-up appointment. He further testified that within a few days following his work accident, he also began experiencing low back pain. The Arbitrator adopts this testimony as material findings of fact.

On February 9, 2010, Petitioner completed a medical history form for Illinois Valley Orthopedics indicating that he was experiencing neck and low back pain. He returned to on February 12, 2010, for an appointment with Dr. Jason Bergandi who was with Illinois Valley Orthopedics. There he completed a medical form wherein he described that he was experiencing neck, shoulder and lower back pain. Dr. Bergandi noted his chief complaints of pain were in his neck, bilateral shoulder and low back. The patient gave Dr. Bergandi a history that he fell out of a truck on January 15, 2010 and landed, twisting his abdomen and neck.

Dr. Bergandi's physical examination revealed that employee HERMAN had limited range of motion in the neck and weak grip strength. Dr. Bergandi noted a positive Waddell sign when he pressed on employee HERMAN's head as well as with thoracic bending.

Dr. Bergandi reviewed the MRI scan of employee HERMAN's neck, which showed disc bulging at C3-4, C4-5 and somewhat of C5-6. Dr. Bergandi diagnosed him with cervicalgia, possible upper extremity radiculopathy as well as right shoulder pain and prescribed Medrol Dosepak, Valium and anti-inflammatories. Doctor instructed him to continue with physical therapy for his neck and also gave have him an order for physical therapy for his low back. Dr. Bergandi found his patient to be totally disabled and scheduled a follow-up appointment on April 15, 2010.

He received six (6) sessions of physical therapy at St. Mary's Hospital from February 18, 2010 to March 5, 2010 and during each of these visits, he reported pain in his low back, neck and shoulders. The therapy records reflect that he cancelled physical therapy on February 26, 2010, due to having back pain. On March 3, 2010, employee HERMAN complained to the therapists of significant back pain and rated it 8 out of 10. He also complained of having neck pain, which he rated as 3 out of 10.

On March 8, 2010 the Petitioner saw Dr. George DePhillips, a neurosurgeon, and gave a history that he was involved in a work accident on January 15, 2010, when he slipped while entering his truck and since that time, has had neck pain, headaches, low back pain, bilateral buttock pain and pain radiating into his legs.

Dr. DePhillips reviewed the cervical MRI which revealed degenerative disc disease, cervical spondylosis and foraminal stenosis at various levels.

Dr. DePhillips believed that the work injury could or might have aggravated the degenerative disc disease in the cervical region as well as his cervical spondylosis. Dr. DePhillips also ordered a lumbar MRI and recommended that he receive diagnostic injections from Dr. Sharma to his lower back.

On March 13, 2010, he underwent a lumbar MRI which, according to the radiologist, showed at the L4-5 level, a moderate sized universal protruding disc with extrinsic pressure on the dural sac, marked narrowing of the left neural foramen and moderate narrowing of the right neural foramen.

On April 8, 2010, the Patient saw Dr. Samir Sharma with complaints of neck pain, upper back pain, shoulder pain and low back pain. He also told Dr. Sharma that his current episode of pain after his injury on January 15, 2010, when he fell from a seven foot height. Dr. Sharma reviewed the lumbar MRI, which he believed showed disc protrusion at L4-5. Dr. Sharma diagnosed him with shoulder pain, upper back pain, neck pain and low back pain. Dr. Sharma's records indicated that he previously treated employee HERMAN on September 11, 2009, for neck pain, upper back pain, knee pain and shoulder pain. Also, on November 6, 2009, Dr. Sharma performed a cervical diagnostic medical branch block of the C5, C6, C7 medial branch nerves. Dr. Sharma restricted his patient from work.

The Patient returned on April 15, 2010 to Dr. Bergandi for follow-up treatment for his neck pain. Dr. Bergandi found on physical examination that employee HERMAN had very little range of motion of the neck, secondary to pain. Dr. Bergandi diagnosed him with cervicalgia and restarted him on physical therapy. He also prescribed for Dr. Sharma to consider giving employee HERMAN trigger point injections in the cervical spine near the trapezius muscle. Dr. Bergandi restricted employee HERMAN from work until his next visit on June 15, 2010. On April 22, 2010, Dr. Samir Sharma performed transforaminal epidural steroid injections on patient at levels L4 and L5. Dr. Sharma also refilled his prescription of Vicodin ES, 120 tablets, which could be taken three times a day.

On May 3, 2010, he saw Dr. DePhillips complaining of low back pain which radiated into his buttock and down his thighs. He also complained of headache, neck pain and left arm pain. Dr. DePhillips requested the patient obtain the actual lumbar MRI films in order for Dr. DePhillips to determine whether to order a lumbar discography.

Petitioner was filmed on May 5, 2010, from 10:10 a.m. to 11:10 a.m., unloading small pieces of landscaping material from a trailer for a patio project. He testified that these small landscaping pieces did not weigh very much. On May 5, 2010, employee HERMAN cancelled his scheduled physical therapy session that day due to having an increase in pain. The Arbitrator did not observe any gross deviation in activity against medical orders in the medical testimony. Petitioner was filmed on May 7, 2010, at 8:34 a.m. walking into his home. The surveillance video from 10:07 a.m. to 10:09 a.m., showed him walking in his yard and picking up an empty cardboard box that ended up in his yard. He is not filmed again that day until 12:48 p.m. According to the St. Mary's Hospital records show he was in physical therapy from 11:30 a.m. to 12:00 p.m.

Additionally, he planted some flowers. On May 7, 2010 Petitioner attended aquatic therapy from 11:30 a.m. to 12:00 p.m. The physical therapy records indicate that he complained of having pain all over. After his therapy session, it was noted that the treatment plan was for him was to receive injections in the neck the next Thursday.

On May 7, 2010, at 8:52 a.m., the patient called Dr. Sharma's office to schedule a cervical injection. According to the office records, Dr. Sharma's office planned to schedule the injection on May 20, 2010, when employee HERMAN would be out of medication. He told the staff that he would be out of medication early, so they scheduled his appointment for May 13, 2010.

On May 10, 2010, Dr. DePhillips reviewed the lumbar MRI that had been taken on March 13, 2010 and he believed the MRI showed a disc bulge at L4-5 with a protrusion at L5-S1 with a tear of the posterior annulus. He also found moderate spinal stenosis at L4-5. (2)

Petitioner complained that he was having neck and shoulder pain, but that his low back pain was more bothersome than his neck pain. Dr. DePhillips recommended a lumbar discography and a cervical epidural steroid injection. Dr. DePhillips restricted employee HERMAN from work until his next follow-up visit. He was filmed on May 11, 2010 starting at 9:17 a.m. taking out garbage and also rinsing out a garbage can. He was filmed from 9:38 a.m. to 9:39 a.m., spreading grass seed then planting flowers, painting in his garage and walking in his yard.

On May 14, 2010, he complained to the treater at the Pain Institute of neck and shoulder pain and received an epidural steroid injection at C6-C7.

On June 15, 2010 Dr. Timothy VanFleet peformed a section 12 examination of the worker at the request of employer. He diagnosed symptom magnification, cervical and lumbar degenerative disc disease.
Dr. VanFleet believed that Petitioner was at maximum medical improvement and anticipated a full duty release based upon a valid functional capacity evaluation.

The Petitioner returned to Dr. Bergandi on 6/17/10 with ongoing neck pain which had worsened since the epidural steroid injections two weeks before. Dr. Bergandi believed that the cervical MRI did not show significant disc herniations, although possibly a far lateral disc herniation at C5-6. The Patient had very little range of motion in his neck, secondary to pain and stiffness. The diagnosis was mild cervicalgia, mild degenerative disc disease of the cervical spine and mild cervical spondylosis. He recommended trigger point injections and aquatic therapy two times a week for four weeks. On August 10, 2010, Dr. Bergandi referred employee HERMAN to Dr. DePhillips for a second opinion . October 6, 2010, Dr. DePhillips ordered a Functional Capacity Evaluation to be done at Newsome Physical Therapy Center. The results of the Functional Capacity Evaluation showed consistent effort .The evaluation was considered to be valid. All Waddell's signs were documented as being negative. The Patient was determined to be functioning between light (20#) and light/medium (35#) demand level. Based upon his job description as a truck driver, the evaluator found the patient fell below the medium physical demand level of his job. The evaluator also recommended work hardening.

On November 18, 2010, employee HERMAN had a lumbar discogram done by Dr. Sharma. On December 2, 2010, Dr. DePhillips interpreted the discogram results as showing concordant pain at L4-5 and L5-S1 levels. The post discogram CT scan showed annular tearing at L3-4, L4-5 and L5-S1 levels. Dr. DePhillips recommended a two level discectomy and fusion. He then referred employee HERMAN to Dr. Sean Salehi, for a second opinion. On May 5 he was examined by the neurosurgeon, former teacher at Northwestern Medical School, Dr. Salehi and complained of low back pain that radiated into his legs.
He gave a history of falling as he attempted to climb into his truck. Dr. Salehi reviewed the MRI of the lumbar spine dated 03/13/10, which showed L4-5 facet arthropathy resulting in significant left lateral recess stenosis. Dr. Salehi believed it would be wise to avoid a multi-level fusion due to the chances of not improving his lumbar symptoms. He did recommend a limited left L4-5 hemilaminectomy and facetectomy to resolve the left leg symptoms.

The patient teated with Dr. Sharma on twelve (12) different occasions from June 29, 2010 to January 13, 2012. Employee HERMAN consistently complained of neck pain, upper back pain, shoulder pain and low back pain. The treatment was trigger point injections, medication management consisting of Vicodin ES, which was then switched to Ultram after patient developed stomach problems. Hisl condition remained relatively stable, unchanged.
On November 18, 2010, Dr. Sharma recommended that employee HERMAN's work restrictions be at light duty with his lifting restrictions consistent with FCE testing.

On January 18, 2011he told Dr. Sharma that his leg symptoms had increased since the last visit. In regards to employee HERMAN's neck pain, Dr. Sharma diagnosed it as discogenic pain. At his last visit on January 13, 2012, Dr. Sharma ordered a lumbar MRI to rule out worsening stenosis.

On January 23, 2012, Petitioner underwent a lumbar MRI and gave a history at the hospital of having low back pain and bilateral leg pain. The radiologist found at the L4-5 level, encroachment on the descending nerve roots in the lateral recesses, bilaterally, greater on the left. The radiologist also found mild bilateral neural foraminal encroachment..

On January 20, 2011, Dr. George DePhillips testified the Petitioner became his patient on March 8, 2010 and gave a history of having neck pain, bilateral extremity pain, low back pain, bilateral buttock pain and pain radiating into thighs and calves following his work injury on January 15, 2010. Dr. DePhillips discussed with him the possible differential diagnosis of diskogenic pain, myofascial pain and facet medicated pain. Dr. DePhillips recommended that Dr. Sharma continue with the epidural steroid injection and also recommended a MRI scan of the lumbar spine.

Dr. DePhillips testified the patient returned on May 3, 2010, and reported that he received two lumbar epidural steroid injections. The first injection gave him temporary relief for a week, however the second injection did not provide any relief of his back pain and radicular symptoms. Employee HERMAN brought his lumbar MRI report to Dr. DePhillips, but did not have the films to show Dr. DePhillips. Dr. DePhillips requested the actual films to review, but based upon the reported lumbar MRI findings, Dr. DePhillips considered ordering a lumbar diskography to determine if the pain was diskogenic in origin.

Dr. DePhillips testified that on May 10, 2010, he reviewed the lumbar MRI films, which revealed a disc bulge at L4-5 and moderate spinal stenosis with a protrusion at L5-S1 along with a tear of the posterior annulus. Dr. DePhillips arrived at the diagnosis of pre-existing lumbar spondylosis including degenerative disc disease, facet hypertrophy, arthropathy and diskogenic pain.

Regarding causation, Dr. DePhillips testified that he believed that Mr. Herman's work accident on January 15, 2010, aggravated his degenerative disc disease and more likely than not, caused the annular tearing.

Dr. DePhillips further testified that on October 19, 2010, he reviewed the FCE report and found that it was a valid representation of his physical abilities at a light demand level and that there was no indication of malingering, secondary pain or inconsistencies during the evaluation.

Dr. DePhillips further testified that employee HERMAN could not safely return to work as a truck driver since he was at the light physical demand. Dr. DePhillips also testified that he last saw employee HERMAN on December 2, 2010, at which time he reviewed both the MRI can of his lumbar spine as well as the lumbar diskogram. The diskogram provoke concordant pain at the L4-5 and L5-S1 levels. Clinically, employee HERMAN's complaints of low back pain were consistent with the diskography results.

Most noteworthy to this Arbitrator, Dr. DePhillips believed that surgery was a treatment option, but he could not decide whether to recommend a two level or three level spinal fusion, so he recommended a second opinion from Dr. Sean Salehi. Per Px 12, dep exhibit 1a, the doctor is a board certified neurological surgeon and partner in Neurological Surgery and Spine Surgery, SC. in Westchester, Illinois. He had been an assistant professor of neurological surgery at Feinberg School of Medicine at Northwestern University after being a chief resident and instructor.

Importantly regarding the videos, Dr. DePhillips testified that he never restricted his patient from driving a vehicle, walking, standing, sitting, bending at the waist or carrying an object that weighed as much as a gallon of milk.

Dr. DePhillips testified on cross-examination that he primarily treated his patient for low back and had not narrowed the differential diagnosis for his neck condition.

On June 15, 2011, Dr. VanFleet , the employer's section 12 examiner testified that he is a board certified orthopedic surgeon, who a year earlier examined the employee at the request of his employer. He recorded a history that he fell out of a semi-truck and when he fell, he twisted and injured his neck and low back with pain radiating into his arms and legs. He also said that he was taking Vicodin every four to six hours for the pain. Dr. VanFleet testified that after examining employee HERMAN and reviewing the medical records, including the cervical and lumbar MRI studies, he diagnosed employee with cervical and lumbar degenerative disk disease with symptom magnification and a non-organic pain syndrome. He further testified that it was difficult to say that the condition was related to his injury because it was entirely subjective. Dr. VanFleet had no treatment recommendations and felt Petitioner needed a functional capacity evaluation in order to return him back to work.

Dr. VanFleet reviewed the surveillance video tape and commented that the activities the video tape were not consistent with his behavior during the medical evaluation. Dr. VanFleet also testified that he reviewed the FCE that recommended he function at the medium light level, which Dr. VanFleet believed was consistent with his job description as a truck driver. Dr. VanFleet further stated that a two level fusion, as recommended by Dr. DePhillips, was not reasonable medical care. Dr. VanFleet also believed he was at maximum medical improvement in June 2010 and could return to work.

On cross-examination, Dr. VanFleet stated that as far as he was aware, Petitioner never had any prior back injury, nor had he viewed any records suggesting prior back treatment. Dr. VanFleet testified that the radiologist's lumbar MRI report stated that at L4-5 level, there was a moderate sized protruding disk seen with extrinsic pressure on the dural sac. He described the L4-L5 level via MRI as showing facet hypertrophy with degenerative disk disease and stenosis.
Dr. VanFleet agreed on cross-examination, that the trauma the Petitioner sustained in his work accident could or might have aggravated, exacerbated a pre-existing disk problem at that level.

He further testified that the radiologist who interpreted the discogram at L4-5, stated that it showed a Grade 4 radial tear, while Dr. VanFleet testified that he described L4-5 as showing evidence of degenerative pattern. Dr. VanFleet agreed on cross-examination that trauma could worsen or exacerbate an annular tear.

Morever, he said that Petitioner's back pain could be from a multi-level degenerative pattern. He did admit that there was no evidence that Mr. Herman had any back pain prior to January 15, 2010. Although, he also agreed that it was possible that the MRIs', discograms and CT scans which indicate multiple tears in the low back, could or might generate pain. Dr. VanFleet confirmed a protruding disc can be a pain generator.

Dr. VanFleet testified that he believed the FCE results were consistent with his job as a truck driver. However, on cross-examination, it was pointed out to Dr. VanFleet that Petitioner fell below the medium physical demand characteristic of his work which required an occasional two handed floor to waist. Also, Dr. VanFleet acknowledged that the physical therapist recommended work hardening for their patient before he attempted to return back to work.

On August 2, 2012, Dr. Sean Salehi testified at his evidence deposition that is a board certified neurological surgeon, trained at Northwestern Medical School and was a faculty member at Northwestern Medical School before moving to private practice where the vast majority of his treatment is of the spine.
Dr. Salehi further testified that he performs 300 spine surgeries a year and commonly performs hemilaminectomies and facetectomies.

Dr. Salehi state that he saw employee HERMAN on May 2, 2011, as a second opinion referral from Dr. DePhillips. According to Dr. Salehi, his patient complained of pain in his neck and pain in his low back that radiated and gave a history of being injured at work on January 15, 2010, when he was climbing into his truck and fell backwards, landing directly on his feet.

Dr. Salehi testified that he performed a detailed neurologic examination which revealed tenderness in the lumbosacral spine, limitation of range of motion by 50% and a positive straight leg raise testing, but only in the back. Dr. Salehi stated that he reviewed the MRI film which showed significant bilateral L4-5 and L3-4 facet arthropathy, L4-5 facet arthropathy resulting in significant left lateral recess stenosis. Dr. Salehi testified that he reached a diagnosis of lumbar degenerative disc disease and lumbosacral spondylosis. *Dr. Salehi further testified that he would recommend avoiding a multi-level fusion, but rather concentrate on a smaller operation to treat his radicular symptoms in the left leg, which would consist of a left hemilaminectomy and facetectomy.(emphasis added)*

Dr. Salehi also stated that the mechanism of injury described by employee HERMAN is certainly there for causing aggravation of his back condition. Dr. Salehi testified that if employee HERMAN had no prior history of ongoing back issues, then it is reasonable to say that the accident did result in aggravation. He further testified that if employee HERMAN's left leg pain was a majority portion of his pain complex, then surgery would make sense and therefore is causally related to the accident of January 15, 2010.

On cross-examination, Dr. Salehi agreed that he only saw Herman for his lower back problems. He further stated that the conditions of lumbar degenerative disc disease and lumbosacral spondylosis were aggravated by his accident.

F. **IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?**

At the Arbitration hearing on August 30, 2012, Petitioner testified that he was in his usual state of health when he began working for employer, WENGER TRUCK LINES. He further testified that he had never before injured his low back or received medical care to his low back. There were no medical records presented at Arbitration to contradict his testimony concerning this issue.

Petitioner further testified that on January 15, 2010, while attempting to climb into his cab, he slipped and fell down the side of the truck. As per above, he was taken by ambulance to Illinois Valley Community Hospital emergency room where he was diagnosed with a cervical strain and bilateral shoulder strain. He then came under the care of Dr. Bergandi for his neck condition, which he diagnosed as cervicalgia. Petitioner was also seen by Dr. DePhillips for his neck condition, which he diagnosed as aggravation of the degenerative disc disease in the cervical region. In regards to the Patient's low back condition, Dr. DePhillips diagnosed it as an aggravation of a degenerative disc disease and an annular tearing.

Dr. Sean Salehi also treated employee HERMAN and diagnosed him with L4-5 facet arthropathy resulting in significant left lateral recess stenosis. Dr. Salehi believed his patient's work injury certainly could have aggravated his pre-existing conditions.

Based upon the totality of the evidence, the Arbitrator finds as a matter of fact and as a conclusion of law that there is a causal connection between employee HERMAN's current condition of ill-being requiring surgery as prescribed by Dr. Sean Salehi i and his work injury sustained to his neck and low back as alleged herein.

J. **WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?**

The Arbitrator adopts his previous findings for disputed issue (F). Employee HERMAN submitted into evidence the following outstanding medical bills:

1. Peru Ambulance (PX. 13) ..... $ 810.50
2. Hospital Radiology (PX. 14) ..... $ 580.00
   (Date of service 01/15/10 and 01/23/10)
3. Ottawa Regional Hospital (PX. 15) ..... $ 2,790.00
   (Date of service 01/23/12)
4. St. Mary's Hospital (PX. 16) ..... $ 7,766.75
   (Dates of service 02/17/10 to 05/26/11)
5. Dr. George DePhillips (PX. 17) ..... $ 1,040.00
6. Pain & Spine Institute (PX. 18) ..... $ 21,703.81
   (Dates of service 03/22/10 to 01/13/12)
7. Illinois Valley Orthopedics (PX. 19) ..... $ 403.00
   (Dates of service 02/12/10 to 08/24/10)
8. Provena St. Joseph Medical Center (PX. 20) $3,495.00
   (Date of service 11/18/10)
9. Joliet Radiological Service (PX. 21) ..... $ 198.00
   (Date of service 11/18/10)
10. Neurological Surgery (PX. 22) ..... $ 225.00
    (Date of service 05/02/11 - reimbursement to petitioner)
11. Central Illinois Radiological (PX. 23) ..... $ 478.00
    (Date of service 01/23/12)
12. Associated St. James Radiology (PX. 24) $ 784.00
    (Dates of service 02/19/10 to 05/26/11)
13. Prescription medication (PX. 25) ..... $ 648.15
    (01/16/10 to 09/12/11 - reimbursement to petitioner)

TOTAL ..... $ 40,922.21

The Arbitrator finds based upon the totality of the evidence after reviewing the medical records introduced into evidence, as well as the evidence depositions, that the medical bills submitted by the Petitioner herein for payment/ reimbursement are as a matter of fact and law, reasonable and necessary under Section 8(a) of the Act.

The Arbitrator, therefore, orders employer, WENGER TRUCK LINES, to pay to the Petitioner and his lawyer $40,922.21 for medical services as provided in Section 8(a) of the Act. The bills for service rendered after 02/01/06 are awarded in conjunction with the fee schedule and are subject to the provisions and limitations of Section 8(a) and Section 8.2 of the Act.

K. **IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE ?**

Dr. Sean Salehi testified that employee HERMAN's lumbar MRI demonstrates L4-5 facet arthtropathy resulting in significant left lateral recess stenosis. It is Dr. Salehi's well-reasoned opinion adopted by the Arbitrator as the material finding of fact herein, that a multi-level lumbar fusion should be avoided and instead a left hemilaminectomy and facetectomy would better treat the radicular symptoms employee HERMAN experiences in his left leg. The Arbitrator adopts the opinion of Dr. Sean Salehi, including his recommendation on the type of surgical procedure to relieve Petitioner of his left leg pain. The Arbitrator further finds that Dr. George DePhillips' recommendation for a multi-level lumbar fusion is not as persuasive as Dr. Salehi's opinion against that surgical procedure. The Arbitrator also finds that Dr. VanFleet's opinion that there are no treatment options is not adopted based upon Dr. Salehi's more reasoned opinion. The Arbitrator, therefore, based upon the totality of the evidence finds as a matter of law Mr. Herman is entitled to prospective medical care as testified to by Dr. Sean Salehi.

L. **WHAT TEMPORARY BENEFITS ARE IN DISPUTE? TTD?**

Employee HERMAN claims that he has been temporarily totally disabled from January 16, 2010, through August 30, 2012, for a period of 136-6/7 weeks. Employer, WENGER TRUCK LINES, claims HERMAN has been temporarily totally disabled from January 16, 2010, through July 9, 2010, for a period of 25 weeks.

Petitioner was initially restricted from work by the Illinois Valley Community Hospital emergency room physician. He was then instructed to follow-up with Illinois Valley Orthopedics, where he came under the care of orthopedic surgeon, Dr. Jason Bergandi. The initial office visit with Dr. Bergandi was on February 12, 2010, at which time Dr. Bergandi ordered physical therapy and restricted employee HERMAN from work from February 12, 2010 to April 15, 2010. When the Patient returned on April 15, 2010, Dr. Bergandi ordered trigger point injections and continued employee HERMAN off work until further notice. He returned to Dr. Bergandi on June 17, 2010, who ordered additional physical therapy and took him off work until further notice. On August 10, 2010, Dr. Bergandi referred the patient to Dr. DePhillips for a second opinion and took him off work. He treated with neurosurgeon, Dr. George DePhillips, who on May 10, 2010 reviewed the lumbar MRI film and recommended a discography and restricted employee HERMAN from all work.

On June 15, 2010, Dr. Timothy VanFleet examined him for Respondent under section 12, who released him to work with a recommendation for a functional capacity evaluation, and if valid, then perhaps restrictions could be placed at that time. On October 6, 2010 he had a FCE which placed him functioning between light and light/medium duty. The physical therapist determined that employee HERMAN fell below the physical demands of his job. On November 8, 2010, when the Patient saw Dr. Samir Sharma, his pain management specialist, he was released to work at light duty with lifting restrictions consistent with FCE testing.

Dr. George DePhillips testified at his evidence deposition on January 20, 2011, that his patient could not return to work as a truck driver since he was at the light physical demand level. Employer, WENGER TRUCK LINES, did not demonstrate that it ever offered employee HERMAN light to light/medium work after terminating temporary total disability benefits on July 9, 2010.

Based upon the totality of the evidence, the Arbitrator finds that Larry Herman is entitled as a matter of law to received TTD payments in the amount of $236.22 per week from January 16, 2010 through August 30, 2012, for a period of 136-6/7 weeks. The Respondent is ordered to pay that accrued amount to the Petitioner and his lawyer.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse WAGES	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Reed,

Petitioner,

14IWCC0183

vs.

NO: 05 WC 1756

TH Ryan Cartage Company, and L&D Driver Services, Inc.,

Respondent,

DECISION AND OPINION ON REMAND

This matter came before the Commission on Judge Patrick Sherlock's August 15, 2013, remand. The Judge affirmed the finding that the Petitioner's overtime earnings should be included in his average weekly wage. The Judge also affirmed the Commission regarding their findings on all other issues except for average weekly wage. The Judge remanded this award back to the Commission for a clarification as to how the Commission arrived at the calculation of an average weekly wage of $812.50.

The Commission, after reviewing the record, lowers the Petitioner's average weekly wage to $808.32, and modifies the Arbitrator's original award.

It is the Commission's opinion that the payroll records provided by the Respondent contain enough information regarding the Petitioner's regular and overtime hours in which to calculate his average weekly wage.

According to Respondent's Exhibit 11, Petitioner started working for Respondent on or about April 23, 2004. He made $15.00 an hour at straight time. From April 23, 2004 through August 12, 2004, Petitioner worked a total of 14 2/7 weeks. During the week of July 23, 2004, Petitioner worked 3 days and during the week of June 25, 2004, he worked 4 days. During that period, Petitioner worked 571.43 straight time hours and 198.42 in overtime hours or a grand total of 769.85. Multiplying that amount of hours (769.85) times Petitioner's straight time hourly

14IWCC0183

pay ($15.00) yields a sum of $11,547.52. By dividing that amount ($11,547.52) by the 14 2/7th weeks that Petitioner worked, it is then determined that Petitioner had an Average Weekly Wage of $808.32.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's average weekly wage is $808.32.

Per the remand order of Judge Sherlock, all else is affirmed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED:

MAR 17 2014

Charles J. DeVriendt

Michael J. Brennan

Ruth W. White

HSF
O: 2/19/14
049

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DENNIS FRETTS,

Petitioner,

14IWCC0184

vs.

NO: 09 WC 26492

ABF FREIGHT SYSTEMS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent of permanent disability, penalties and attorney fees, maintenance benefits, and vocational rehabilitation, and being advised of the facts and law, clarifies and corrects the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

On page 14 of Arbitrator's decision, the Commission corrects the Arbitrator's statements with regard to Petitioner's job search. On page 14, paragraph one, sentences seven and eight, the Commission strikes "Neither was there evidence presented of a self-directed search. The Arbitrator has not been presented with any evidence of a search, diligent or not;" To the contrary, a review of the record reveals Petitioner did submit a set of job search records, PX17. However, in so finding, the Commission affirms and adopts the Arbitrator's conclusion that Petitioner failed to present evidence of a diligent job search. The documents contained within PX17 fail to support Petitioner's testimony that he engaged in a diligent job search. A review of the documents within PX17 reveals that none of the job search records submitted by Petitioner pertained to any actual posted job openings, and instead it appears Petitioner merely called or walked into businesses without identifying opening, and merely inquired if the businesses were hiring. The records submitted fail to indicate that Petitioner completed any job applications, submitted any resumes, and little if any follow up on any of his alleged inquiries.

On page 15, paragraph one, sentence two of the Arbitrator's decision, the Commission strikes "25% of the right arm or," and finds that because Petitioner's undisputed work injury involves his shoulder, the permanency is properly awarded under Section 8(d)2 of the Act, and Petitioner has established permanent partial disability to the extent of 12.65% loss of use of the person as a whole. See Will County Forest Preserve District v. IWCC, 2012 Ill.App.3d 110077WC, 970 N.E. 2d 16, 361 Ill.Dec. 16, where Appellate Court held that the shoulder is distinct from the arm and that permanency awards in such cases should be made pursuant to Section 8(d)(2) of the Act rather than Section 8(e).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 8, 2012, as corrected and clarified herein, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $693.98 per week for a period of 53-4/7 weeks, for the period of December 7, 2007 through December 15, 2008, and the sum of $841.77 per week for a period of 54-2/7 weeks, for the period of May 12, 2009 through May 25, 2010, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $624.58 per week for a period of 63.25 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use to the person as a whole to the extent of 12.65%.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $17,683.48 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and attorney's fees is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid to or on behalf of Petitioner on account of said accidental injury, including Respondent's payment of $98,158.06 for temporary total disability benefits paid, $7,045.68 for temporary partial disability benefits paid, and $10,512.60 for a permanent partial disability advance.

14IWCC0184

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $6,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014
KWL/kmt
O- 12/17/13
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0184

FRETTS, DENNIS
Employee/Petitioner

Case# **09WC016718**

09WC026492

ABF FREIGHT SYSTEMS INC
Employer/Respondent

On 11/8/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.15% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0274 HORWITZ HORWITZ & ASSOC
MARK WEISSBURG
25 E WASHINGTON ST SUITE 900
CHICAGO, IL 60602

2965 KEEFE CAMPBELL & ASSOC LLC
JOSEPH F D'AMATO
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

14IWCC0184

Dennis Fretts
Employee/Petitioner

Case # 09 WC 16718

v.

Consolidated Case: 09 WC 26492

ABF Freight Systems, Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lynette Thompson-Smith**, Arbitrator of the Commission, in the city of **Chicago**, on August 27, 2012. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☒ TPD ☒ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other **Workers' Compensation fraud, ppd advance**

FINDINGS

On **5/8/09**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$28,991.22**; the average weekly wage was **$1,262.65**.

On the date of accident, Petitioner was **52** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent has not paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ 98,158.06 for TTD benefits paid, $7,045.68 for TPD benefits paid, $0.00 for maintenance benefits paid to date and $10,512.60 for a PPD advance for a total of $115,715.34.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $693.98 per week for 53 &4/7 weeks commencing December 7, 2007 through December 15, 2008, as provide in Section 8(b) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $841.77/week for 54 & 2/7 weeks, commencing May 12, 2009 through May 25, 2010, as provided in Section 8(b) of the Act.

Respondent shall pay to the medical service providers reasonable and necessary medical services up to $17,683.48 or the balance of the expenses, pursuant to this decision, as provided in Section 8(a) of the Act.

Respondent shall have credit for any and all medical services, temporary total disability and temporary permanent disability previously paid pursuant to sections 8(a) and 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $624.58 per week for 63.25 weeks because of injuries sustained caused 25% loss of the right arm as provided in Section 8(e) of the Act or 12.65% loss of the whole person, a provided by Section 8(d)(2) of the Act.

No penalties or attorney's fees are awarded.

RULES REGARDING APPEALS: Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE: If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of

payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A. Thompson-Smith

Signature of Arbitrator

November 7, 2012

NOV - 8 2012

The disputed issues in the matter of 09 WC 16718 are: 1) causal connection; 2) temporary total disability; 3) temporary permanent disability; 4) medical bill payments; 5) penalties; 6) attorney's fees; 7) nature and extent; and 8) determination of workers' compensation fraud. *See,* AX1

The disputed issues in the matter of 09 WC 26492 are: 1) causal connection; 2) temporary total disability; 3) temporary permanent disability; 4) medical bill payments; 5) penalties; 6) attorney's fees; 7) nature and extent; 8) determination of workers' compensation fraud; 9) wage differential period; 10) maintenance; and 11) permanent partial advances. *See,* AX2.

In case number 09 WC 16718, the date of accident was December 1, 2007. Petitioner testified he was employed by ABF Freight Systems (hereinafter referred to as "Respondent") on December 1, 2007, and May 8, 2009, as a truck driver. Petitioner stated he drove semi-point double trailers loaded with freight from Chicago Heights to other terminals around the country. Petitioner also testified that the other physical aspects of the job included dropping, hooking and setting trailers. He noted that his job did not include loading or unloading the trailers. *See,* Tr. at 24-25. On December 1, 2007, Petitioner testified that it was an icy day and he slipped attempting to get into his truck. His right arm was forced into a forward flexed position as he fell. He testified that he felt a pulling sensation and pain in his right shoulder.

On December 10, 2007, he had x-rays taken at Concentra Medical Center which showed osteopenia and a degenerative spur formation. On December 28, 2007, Petitioner underwent an MRI study for the right shoulder at Provena Health Center which showed severe supraspinatus tendinosis with a superimposed low grade partial-thickness tear of the mid-fibers; moderately severe acromioclavicular osteoarthritis; and severe glenohumeral osteoarthrosis. There was an abnormal signal in the anterior labrum suspicious of a tear and the technician also suspected a degenerative condition.

On January 12, 2008, Dr. Corcoran diagnosed the petitioner as having right shoulder osteoarthritis, rotator cuff tendonitis and impingement syndrome. Petitioner was taken off work for four (4) weeks and prescribed physical therapy ("PT") three (3) times per week for four (4) weeks. Dr. Corcoran also prescribed 200 mgs of Celebrex and administered an injection of Kenalog and Marcaine.

On January 15, 2008, Petitioner started PT and continued PT until March 6, 2008, with the

doctor stating that Petitioner had an exacerbation of existing glenohumeral arthropathy and also had impingement syndrome. On March 31, 2008, Petitioner underwent a right shoulder arthroscopy; a chondroplasty of glenoid and humerous; an arthroscopic Bankart repair; debridement of an undersurface rotator cuff tear; a subacromial decompression consisting of CA ligament excision; and an acromioplasty with arthroscopic distal clavicle re-section. He was placed on PT and taken off of work until further notice.

On August 20, 2008, Petitioner started a work conditioning assessment at AthletiCo and on September 29, 2008, the therapist noted that he was reporting right shoulder pain. It was noted that scar tissue was limiting his range of motion ("ROM") and tissue massage was prescribed through September of 2008; and chiropractic treatment was prescribed through October 2, 2008.

On November 4, 2008, Petitioner completed a valid functional assessment at ATI Physical Therapy and demonstrated an ability to function at the medium to heavy physical demand level. It should be noted that Petitioner's truck driving occupation was described as requiring a medium physical demand level.

On November 11, 2008, Dr. Corcoran noted this demand level and stated that Petitioner had some concerns about whether he could work overhead and move dollies to pull dual trailers. Upon physical examination, the doctor observed that Petitioner lacked ten (10) degrees of forward flexion and external rotation. He continued Petitioner off of work for another four (4) weeks then on December 3, 2008, released him to work with the following restrictions: 1) no overhead lifting; 2) ground level work only; and 3) no lifting over thirty (30) pounds.

On December 15, 2008, Dr. Corcoran commented on Petitioner lack of ROM, i.e. twenty (20) degrees of forward flexion on the right and fifteen (15) degrees of external rotation on the right side compared to the left. Petitioner was released to return to work in a full duty capacity.

Petitioner continued treating with Dr. Corcoran, i.e. having a cortisone shot on January 26, 2009 and upon a March 6, 2009 examination, Dr. Corcoran observed that the petitioner lacked twenty (20) degrees of forward flexion and ninety (90) degrees of abduction and fifteen (15) degrees of external rotation. He stated that Petitioner had lost some ROM and was going to have some chronic disability and diffused degenerative changes, exacerbated by his work injury.

On May 8 2009, Petitioner had a second accident. He testified that he was at work, hooking up a double trailer, pulling a gear chain to connect to the trailer, when he jarred his right shoulder. His relevant duties as an over-the-road driver, at the time of this accident, consisted of (1) driving a semi-point double trailer; (2) being able to hook and unhook an approximately three hundred (300) pound converter gear; (3) being able to maneuver it which according to one of Respondent's witness, took approximately five to ten pounds of force for five seconds, and (4) being skilled in driving a double tractor-trailer rig.

On May 12, 2009, Petitioner went to Concentra Medical Centers and was seen by Dr. Knight who ordered an MRI; then released him to return to work with restrictions of no lifting, pulling or pushing; and limited use to the right arm. Respondent accommodated Petitioner's restrictions.

On May 22, 2009, Petitioner underwent an MRI of the right shoulder at Provena St. Mary's Hospital which showed severe, chronic-appearing degenerative changes of the glenohumeral joint with remodeling of the articular surface of the humeral head; and glenoid consistent with a chronic labrum tear. A full-thickness tear of the supraspinatus tendon was noted with a possible loose body in the anterior aspect of the joint space. The supraspinatus tendon finding appeared to be new when compared to diagnostic testing performed on December 28, 2007. The glenoid labrum changes appeared more advanced. On May 27, 2009, Dr. Knight released Petitioner to return to work in a full duty capacity, without restrictions.

On May 29, 2009, Petitioner was seen by Dr. Anthony Romeo at Midwest Orthopaedics. His

diagnosis was a possible acute right shoulder rotator cuff tear with an underlying diagnosis of glenohumeral osteoarthritis. Dr. Romeo noted Petitioner's original work injury to the right shoulder on December 1, 2007 and his recent work injury to his shoulder on May 8, 2009. He noted that the petitioner now had increased symptoms of pain and a new MRI that revealed obvious degenerative changes of the glenohumeral joint; and a full-thickness tear of the supraspinatus tendon; which was distinct from his previous MRI. He restricted Petitioner to sedentary duty and no work above shoulder level; maximum lifting of ten pounds at or below waist level; and he recommended surgery for rotator cuff repair.

On July 31, 2009, Petitioner underwent a second right shoulder surgery performed by Dr. Romeo at Rush Oak Park Hospital. The operation performed was a right shoulder arthroscopy debridement with a capsular release. Petitioner testified he attended PT and eventually underwent a functional capacity evaluation ("FCE") in April of 2010. *See,* Tr. at 30-33. After reviewing the results of the FCE, Dr. Romeo returned Petitioner to work with the following restrictions: medium duty capacity from floor to waist, light medium capacity from waist to shoulder and light duty above the shoulder level on the right; and he ordered a floor to waist lifting restriction of fifty (50) pounds; from waist to shoulder of thirty-five (35) pounds; and above the shoulder with no more than twenty (20) pounds. Dr. Romeo felt that the restrictions were permanent. *See*, RX14, pg 17.

On August 12, 2009, Dr. Romero prescribed aqua therapy for three months and in October, 2009 he ordered six (6) weeks of PT. In December of 2009, Dr. Romero prescribed PT to treat the capsular release and in January of 2010, ordered Petitioner to be off work for another six (6) weeks for more PT.

On April 8, 2010, Petitioner took an FCE at ATI which was deemed valid however; the petitioner consistently reported anterior and posterior shoulder pain with lifting. The therapist recommended a course of work hardening which the doctor ordered. From April 19, 2010 through May 14, 2010, Petitioner attended a course of work hardening.

On May 26, 2010, Petitioner was released to return to work with the following restrictions:

1) light duty above the shoulder level and lifting a maximum of twenty (20) pounds occasionally and not more than ten (10) pounds frequently; 2) medium to light work from waist to shoulder, lifting a maximum of thirty-five (35) pounds occasionally and not more than twenty (20) pounds frequently; and 3) medium work from floor to waist, lifting no more than a maximum fifty (50) pounds occasionally and not more than twenty-five (25) pounds frequently. Dr. Romero considered petitioner to be at maximum medical improvement ("MMI") and discharged him from his care.

On July 26, 2010, Petitioner presented to Dr. William Vitello, at Respondent's request, for an independent medical examination ("IME"). A report was generated by the doctor, dated July 28, 2010, in which he noted that at the time of examination, Petitioner's complaints were right shoulder pain, lack of ROM and difficulty lifting. There was no symptom magnification and based on the doctor's view of the medical records, his diagnosis of Petitioner's condition was moderate to severe right shoulder glenohumeral arthritis. Dr. Vitello did not believe that the petitioner could work in a full duty capacity, at that time, and he concurred with the permanent work restrictions imposed by Dr. Romero. He went on to state that he agreed with Petitioner's medical treatment and thought that it was reasonable and necessary and that Petitioner's current condition of ill-being was causally related to both the December 1, 2007 and May 8, 2009 accidents, based on a reasonable degree of medical and surgical certainty. And that Petitioner had some degree of pre-existing glenohumeral arthritis, prior to the first accident. *See*, RX28.

On August 13, 2010, Petitioner met with David Patsavas, a certified vocational rehabilitation consultant, at the request of his counsel. A summary of his report is as follows:

> Based on Mr. Fretts' overall transferable skills, prior work history, completion of a high school diploma, and being released to return to work by his treating physician, it is this consultant's professional opinion as a certified rehabilitation consultant that he is a candidate for Vocational Rehabilitation Services. Mr. Fretts could benefit from job readiness and job seeking skills coordination through a certified rehabilitation consultant.

> Additional exploration such as educational training and/or on-the-job training, as well as direct job placement services would be beneficial for Mr. Fretts' return back to gainful employment. It is this consultant's professional opinion that Mr. Fretts' potential earning at this time would be between $10.00 to $15.00 an hour.

On February 2, 2012, Dr. Mash testified, at Respondent's request, that he had performed a records review and had also reviewed surveillance video of the petitioner and he opined that Mr. Fretts is capable of exceeding the restrictions placed upon him by Dr. Romeo. On cross examination, Dr. Mash admitted he did not know what type of truck Mr. Fretts drove for Respondent. He admitted that lifting weights and staying active is helpful after suffering a shoulder injury. He agreed that Dr. Romeo is well respected in the field of shoulder surgery. *See,* RX14 pgs. 25-29.

On February 27, 2012, the parties took the deposition of Ms. Mary Szczepanski, a certified case manager, over Petitioner's attorney's objection that Ms. Szczepanski is not a certified vocational rehabilitation counselor and is not qualified pursuant to section 8(a) of the Workers' Compensation Act, (the "Act"). The case manager rendered a vocational opinion and produced a report regarding the petitioner.

At trial, Petitioner testified that while working, he had stayed within his prescribed restrictions and that he had attempted to return to work with Respondent but that even driving a straight truck and a pick-up truck proved difficult. He testified that he had only worked a few days for Mr. Havner and denied requesting more jobs from Havner Enterprises. He testified that agents of Respondent told him, after his release from Dr. Romeo, that Respondent would not take him back. *See,* Tr. Pgs. 37-40, 162.

Respondent called four witnesses, Christopher Havner, Keith Coffel, Dean Gluth and Stephen Evener.

Christopher Havner's testimony

Mr. Havner testified that he is the owner of Havner Enterprises ("Havner") and that he paid Mr. Fretts $500.00 to drive a flat-bed truck of products to Louisiana and $700.00 to drive a pick-up truck to the East Coast. *See,* Tr. Pg. 182. The petitioner testified that to test whether his shoulder was in condition to return to work, he drove a trip for Havner on August 11, 2011; and it took him twenty (20) hours to drive from Illinois to Louisiana. He further testified that he was under permanent restrictions imposed by Dr. Romeo when he made this trip; that the trip aggravated his shoulder condition; that he was paid $500.00 for making the trip; and that he was still collecting temporary total disability ("TTD") from Respondent at that time, i.e. $800.00 in TTD payments. The petitioner further testified that two months later he drove a second trip for Havner Enterprises in October of 2011, traveling from Illinois to several states on the East Coast in a pick-up truck to deliver lawn mowers; and that he was paid $700.00 for this trip. Mr. Havner's testimony confirmed these trips and the payments.

Keith Coffel testimony

Mr. Coffel testified that he has known Mr. Fretts for twenty (20) years and met him at the gym and that Mr. Fretts told him about the two trips he took for Mr. Havner. Mr. Coffel testified that he warned Petitioner that he might get in trouble for working while receiving TTD benefits. Mr. Fretts told Mr. Coffel that he didn't know if he was going to be able to return to work for Respondent as it depended on the mobility of his shoulder after rehabilitation and his doctor's restrictions. Mr. Coffel testified that he never saw Petitioner lifting weights with his shoulders. *See,* Tr. Pgs. 204-214.

Dean Gluth's testimony

On January 5, 2011, Dean Gluth from Infomax Investigations entered Riverside Health Facility, a private gym in Bourbonnais, Illinois with a video camera and captured video footage of Petitioner exercising and lifting weights. *See,* Tr. Pgs. 249-253. Petitioner was not aware that he was being videotaped. *Id.* pg. 99. Mr. Gluth testified he stood approximately twenty (20) feet from Petitioner while Petitioner was lifting weights and pretended to exercise while conducting surveillance on Petitioner. *See,* Tr. pg. 256. Mr.

Mr. Gluth stated he captured video surveillance using what he termed a "covert camera encased in an ID badge lanyard." *Id.* at 254. This video footage, labeled as Respondent's Exhibit 6, was shown several times during trial and claimant admitted on cross-examination, that the video accurately depicted him exercising at that location on January 5, 2011. *Id.* pgs. 87-88. The parties essentially agreed Petitioner was lifting weights at the gym on January 5, 2011; and they agreed that he was engaged in the following exercises: dumbbell bench presses, push-ups and incline dumbbell bench presses. *See,* Tr. pgs. 83-107. The Arbitrator viewed the video and makes the following factual determinations regarding the movements captured:

- dumbbell bench press: Petitioner was laying on a flat bench pressing dumbbells from his chest outward, using his arms, shoulder and chest for at least eleven (11) repetitions at a time;
- push-ups: Petitioner was in a prone position, face down to the floor, pushing his body weight up and lowering it, using his arms, shoulders and chest for at least 10 repetitions at a time; and
- incline dumbbell bench press: Petitioner was seated on an inclined bench pushing dumbbells from chest movement straight out from his chest using his chest, arms and shoulders for at least eleven (11) repetitions at a time.

The Arbitrator did not discern any evidence of claimant being in discomfort while engaging in the aforementioned activities. The Arbitrator further witnessed Petitioner changing dumbbells frequently, opting for larger and presumably heavier weights during each new set of repetitions.

Petitioner testified none of the weights he lifted on January 5, 2011, were greater than twenty (20) pounds. *See,* Tr. pg. 86. Claimant also testified that at times, he could not recall how much weight he was lifting. *Id.* at 113.

Mr. Gluth testified that the dumbbells Petitioner lifted while doing dumbbell bench presses ranged from forty (40) to fifty-five (55) pounds. *Id.* pgs. 261-272. He testified that he wrote down the weights of the dumbbells lifted by claimant in a spiral notebook while conducting

surveillance. *Id.* at 256-257. At times, Mr. Gluth is visible on the video, examining the dumbbells used by Petitioner at the conclusion of various exercises. *Id.* pgs. 266-267.

On the particular issue of how much weight petitioner was lifting, the Arbitrator finds the testimony of Mr. Gluth to be more reliable than the testimony of claimant. Mr. Gluth's sole purpose for being in the gym was to record Petitioner's activities, while Petitioner's sole focus, presumably, was exercising and lifting weights. Additionally, Mr. Gluth can be seen in Respondent's Exhibit 6, recording the weight of the dumbbells used by claimant. The Arbitrator finds Mr. Gluth's testimony to be more credible and accurate and further finds claimant lifted weights ranging from 40 to 55 pounds in the gym on January 5, 2011. The Arbitrator notes the evidence of claimant lifting dumbbells weighing between 40 and 55 pounds is relevant to the nature and extent of his injuries however it is also noted that the petitioner did not lift the weights overhead but in a lateral motion; pushing out from his chest.

On cross-examination, Mr. Gluth testified that he was not concerned about whether he was violating the rules of the gym by taking covert video on the premises. He could not see the weight printed on the dumbbells while Mr. Fretts was working out, rather, he had to get up and go to the rack where the weights were placed after Mr. Fretts finished exercising; which was some distance away. He admitted it would have been a problem if the people running the gym had seen him videotaping. And he testified that as a private investigator, he is not allowed to obtain video of a person in a tanning salon, hotel room, bathroom, or locker room which the Arbitrator notes that the gym is none of these. *See,* Tr. pgs. 290-309.

Stephen Evener's testimony

Mr. Evener testified that he is currently a supervisor for Respondent, but was a dispatcher at the time of Petitioner's accidents. On direct examination he testified that the job of an over-the-road truck driver required "minute positioning of equipment" that entailed pushing a three hundred pound object. It also requires over-the-head lifting. He later testified that a driver might have to push the converter gear for five to seven (5-7) seconds, and that the gearbox weighs three hundred (300) pounds. He testified that a driver might

need to exert a brief hundred pound pull to pull down an empty trailer door and that this action would require reaching up to grab a fabric strip and pulling down. *See,* Tr.pgs. 323-330.

On cross-examination, Mr. Evener testified he had never driven a double trailer truck and that pushing the converter gear was the hardest part of the job; and that that maneuver is not depicted in the job description video submitted into evidence by the respondent. He testified that moving the converter gear could put the worker at risk of injury and that getting into and out of the truck requires having the right hand extended over one's head; and holding onto a bar on the right side of the driver's door. He stated that the job requires hooking and unhooking overhead cables, which requires some force. He further testified that if someone can't get their hands above shoulder level, that would be a problem in terms of performing the job. He testified that the converter gear weighed approximately five hundred pounds and that it might actually be three thousand pounds or greater. He admitted it would take one to two hundred pounds of exertion to push the converter gear and that climbing in and out of a tractor could occur up to twenty (20) or thirty (30) times on an average work shift. *See,* Tr. Pgs. 349-371.

On rebuttal, Mr. Fretts testified that the job performance video, shown during the trial, depicted "ideal circumstances, a perfectly leveled blacktop driveway, during the daylight." He stated that his job consisted of working in the middle of the night in dark lots with gravel and uneven potholes. He testified that in a lot that was uneven, one had very little room to maneuver and one would have to position the conversion gear manually. He further testified that he would have difficulty pulling himself up into the truck using his right hand, as depicted in the video. He testified that he was told specifically by Jim Keller, an agent of Respondent's, that they would not hire him back after he received permanent restrictions from Dr. Romeo; as he is not physically able to perform the job as he had performed it in 2007 and 2009. *See,* Tr. Pgs. 384-409 & RX5.

14IWCC0184

CONCLUSIONS OF LAW

F. Was Petitioner's condition resulting from the first accident causally related to the injury?

Doctor Corcoran's notes confirm a causal connection for the 2007 accident, and there is no medical evidence disputing that conclusion. Based upon the testimony and evidence of record, the Arbitrator finds that Petitioner sustained a work related injury on December 1, 2007, and that his condition of ill being and all treatment recited above, was a result of that work accident.

Is Petitioner's current condition of ill-being causally related to the injury?

Although Respondent disputes causation, Respondent has presented no evidence calling causation into question. There is a clear causal connection based not only on the facts of the case but Respondent's own IME examiner, Dr. Vitello. The opinion of Dr. Mash related to petitioner's current abilities, not causation. Dr. Romeo noted that the new MRI that was performed on May 22, 2009, revealed a full-thickness tear of the supraspinatus tendon, which was different from his previous MRI. Based upon the petitioner's release to work before the 2009 accident with permanent restrictions, the traumatic accident he suffered at work on May 8, 2009; and the subsequent new findings on diagnostic testing, the Arbitrator finds a causal connection between his subsequent condition of ill being, need for treatment and the new work accident.

In regards to Petitioner's current condition of ill-being, the Arbitrator finds that the petitioner's testimony, that he aggravated his shoulder condition on the over-the-road trip he took to Louisiana on behalf of Havner Enterprises, in August of 2011, should be noted; and that he took an additional over-the road-trip in October. While there apparently was no intervening accident, obviously, neither trip was helpful in the recovery of Petitioner right shoulder condition and should be taken into account when determining the nature and extent of Petitioner's injuries. The Arbitrator finds that the petitioner's current condition of ill-being is causally related to the May 8, 2009 accident.

J. Were the medical services provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary services?

The Arbitrator finds that the respondent is liable under Section 8(a) for all medical bills incurred as a result of the accident of December 1, 2007, based upon the evidence in the record. According to evidence presented by Respondent, these bills have been paid and Respondent shall receive credit for said payments. The Arbitrator also finds that the respondent is liable under Section 8(a) for the medical bills incurred for the accident of May 8, 2009; as stated in Petitioner's exhibit 14, which is attached to AX2; i.e. Midwest Orthopedic at Rush, with a balance in the amount of $1,903.65 and Rush Oak Park Hospital, with a balance in the amount of $15,779.83. The Arbitrator adopts Drs. Romeo and Vitello's opinions and further finds, based upon the treatment records, that all treatment was reasonable and necessary to cure petitioner of his condition of ill being. The Arbitrator notes that all of the medical services for this second accident were tendered prior to the petitioner's two trips for Havner. The respondent confirms payment to Midwest Orthopedics, leaving a $1,903.65 balance and a payment to Rush Oak Park Hospital in the amount of $13,771.89. The respondent shall receive a credit for all medical expenses paid and shall pay the remaining balance of these expenses, if any.

K. What temporary total benefits are in dispute?

The parties disagree on the dates for which TTD was payable for the December 1, 2007 accident. Having heard the testimony and reviewed the evidence, the Arbitrator finds Petitioner's request of TTD is consistent with the record of the periods of time he was kept off work, in this matter. *See,* PXs 2-12. The petitioner testified specifically to those dates he was off work and the two dates on which he returned to work in a light duty capacity for Respondent. *See*, Tr. Pg. 57. Respondent shall pay Petitioner temporary total disability benefits of $693.98/week for 53 4/7 weeks, commencing December 7, 2007 through December 15, 2008, as provided in Section 8(b) of the Act.

A review of the medical records of the second accident indicates that Petitioner was kept off work or given restrictions that would prevent the full performance of his job from May 12,

2009 through May 25, 2010; when he was found to have reached MMI and given permanent restrictions by Dr. Romeo. During that time, he testified to working light duty for Respondent on May 27, 2009 and July 4, 2009. *See,* Tr.58.

Petitioner testified that the two trips previously discussed, were the only trips made for Havner Enterprises between his dates of accident and the time of trial. *See, Tr.* at 75-76; 187. Petitioner testified he never contacted Mr. Havner in order to request additional employment opportunities. However, Mr. Havner testified Petitioner called him on more than one occasion, subsequent to the trips to Louisiana and the East Coast, requesting additional work from Havner Enterprises. *Id.* at 197. Mr. Havner testified he could not offer claimant additional trips because none were available. *Id.* at 197. Petitioner testified that after he was released to return to work with restrictions, he advised the respondent of his release and was asked what his restrictions were and upon relaying them to a Mr. Jim Keller, on or about May 25, 2010, he was told that the company could not take him back because his physical condition did not meet the job description. *See,* Tr. pgs. 407-8. Petitioner testified that the respondent did not offer him assistance in finding other work. *Id.* at 59, therefore he performed a job search on his own. Based upon the medical records and testimony in this matter, the Arbitrator orders that Respondent shall pay Petitioner temporary total disability benefits of $841.77/week for 54 2/7 weeks, commencing May 12, 2009 through May 25, 2010, as provided in Section 8(b) of the Act.

Maintenance

Pursuant to 50 Illinois Administrative Code, Chapter II Section 7110.10, (the "Code") the employer, or its representative has the burden to consult with the injured worker and his representative; and craft a written assessment of the course of medical care and if appropriate, rehabilitation required to return the injured worker to employment when 1) (s)he is unable to resume the regular duties in which (s)he was engage in at the time of the injury or 2) when the period of total incapacitation for work exceeds 120 continuous days; which ever comes first. The injured worker may also initiate and complete this process. There has not been presented, by a preponderance of the evidence that neither party pursued this process. Petitioner testified that he met with David Patsavas, a certified

vocational rehabilitation consultant, on August 13, 2010, at the request of his counsel. Petitioner was declared to have reached MMI on May 26, 2010 and from that time to the date of trial, on August 27, 2012, Petitioner has claimed to be unable to find work that exists in a stable labor market, despite a diligent search. Although a vocational expert, David Patsavas, was hired by Petitioner and testified that Mr. Fretts is currently capable of earning from $10 to $15 per hour, if he were able to find stable work; and he further opined that Mr. Fretts is a candidate for vocational rehabilitation services; no such services were established pursuant to the Code. *See,* PX16. There was no testimony or evidence presented that Petitioner worked with this counselor in instituting the process of vocational rehabilitation and that there was the authorization and implementation of a plan to return the petitioner to gainful employment, pursuant to the Code. Neither was there evidence presented of a self-directed search. The Arbitrator has not been presented with any evidence of a search, diligent or not; and as Petitioner is claiming a period of maintenance for 117 6/7 weeks, the importance of presenting evidence of such a search is paramount. Therefore, Petitioner has not been proven, by a preponderance of the evidence, that he participated in a diligent job search and no maintenance benefits or wage differential benefits, are awarded, pursuant to the Act.

L. What is the nature and extent of the injury?

The Arbitrator takes notice that the petitioner testified that the twenty (20) hour trip to Louisiana, and that is presumably one-way, aggravated his right shoulder condition. Then the petitioner took a second trip to the East Coast, delivering lawn mowers at various locations. As the petitioner claims that he cannot return to work for the respondent because of the condition of his shoulder, one can only surmise that the second trip, while putting funds in his pocket, also did not help to improve the condition of his shoulder and in fact may have exacerbated it. Prior to these trips, Petitioner sustained an injury to his right shoulder; and his medical examinations noted a right shoulder Bankart lesion; and grades 3 and 4 chondromalacia throughout both the humerus and glenoid; as well as undersurface tearing of the rotator cuff; dense thickened hypertrophic bursal tissue; as well as acromioclavicular arthropathy which was end-stage. He underwent surgery by Dr. Corcoran, who performed a right shoulder arthroscopy, chondroplasty of glenoid,

chondroplasty of humerus, arthroscopic Bankart repair, debridement of undersurface rotator cuff tear, subacromial decompression consistent of CA ligament excision, and an acromioplasty with arthroscopic distal clavicle re-section. Therefore, the Arbitrator finds that the nature and extent of petitioner's injuries, resulting from these two accidents to be 25% of the right arm or 12.65% loss of the person as a whole and awards 63.25 weeks of permanent partial disability.

M. Should penalties or fees be imposed upon Respondent?

Petitioner has filed a petition for penalties and attorneys' fees under §19(k), §19(l) and §16 of the Act. The Arbitrator declines to award penalties or fees in this matter. Respondent's conduct does not rise to the level of vexatious and unreasonable or actions taken in bad faith.

N. Is Respondent due a credit?

Respondent alleges a credit of $98,158.08 in temporary total disability and $7,045.68 for temporary partial disability, as well as $10,512.60 in permanent partial disability advances; for a total of $115, 716.36. Respondent's exhibit 3 shows payments from May 21, 2009 through December 28, 2011 totaling this amount paid as temporary total disability, temporary partial disability, and permanent partial disability advances. The Arbitrator awards this total amount of $115,716.36, as delineated by Respondent.

O. In regards to the issue of workers' compensation fraud

Two questions arise concerning the work Petitioner performed for Mr. Havner. First, would it affect Petitioner's right to temporary total disability for those days he work for Mr. Havner and second, Respondent alleges that the trip in October of 2011 constitutes workers' compensation fraud in that Petitioner received temporary total disability while also collecting a salary from a different employer. The resolution of both issues turns on an examination of the case law.

In keeping with the remedial nature of the Workers' Compensation Act and relevant case law, a claimant's earning of occasional wages does not preclude a payment of TTD. This is consistent with the law in several cases indicating that an employee does not have to be reduced to a state of total physical and mental incapacity before TTD can be awarded.

In *J. M. Jones Co. v. Industrial Commission*, 71 Ill.2d 368, 375 N.E.2d 1306, 17 Ill. Dec. 22 (1978), the Supreme Court held that the fact that the claimant was capable of driving as a school bus operator for approximately one hour in the morning and one hour in the afternoon did not preclude awarding TTD. "For the purposes of section 8(f) [section 19(b)], a person is totally disabled when he cannot perform any services except those for which no reasonably stable labor market exists." 71 Ill. 2d 353, 361-62, quoted with approval in *Zenith v. Industrial Commission*, 91 Ill.2d 278 (1982). In *Zenith*, the Supreme Court noted that the fact that the claimant occasionally sold hot dogs from a truck for a few hours per day did not bar him from TTD entitlement. The *Zenith* court also addressed whether this activity amounted to self-employment, finding that it did not.

In *Mechanical Devices v. Industrial Commission*, 344 Ill.App.3d 752, 800 N.E.2d 819, 279 Il 1. Dec. 531 (4th Dist. 2003), the appellate court again found TTD entitlement when the claimant earned occasional wages. Consistent with the court's findings in *J. M. Jones* and *Zenith*, the *Mechanical Devices* court found that a machinist who suffered an arm and back injury and returned to work as a bus driver, averaging 10 to 15 hours per week, was still disabled. The claimant's treatment was ongoing and his condition had not stabilized; therefore, the claimant was entitled to TTD benefits.

In the subject case, the entirety of Petitioner's work for Mr. Havner, during the period of time he was also receiving TTD benefits, was a few days. It is debatable whether or not this work constituted a reasonably stable labor market in that Petitioner testified that he was unable to obtain other work. Because the few days of work driving a flat-bed and pick-up truck did not establish a stable labor market and because Petitioner continued to have restrictions from his doctor, his entitlement to TTD for that period was not interrupted by the work he did for Mr. Havner in August of 2011. Likewise, the days worked light duty for Respondent did not constitute a light duty accommodation.

SECTION 25.5 OF THE ACT STATES IN PERTINENT PART:

(a) It is unlawful for any person....or entity to:
(1) Intentionally present or cause to be presented any false or fraudulent claim for

the payment of any workers' compensation benefit.
(2) Intentionally make or caused to be made any false or fraudulent material statement or material representation for the purpose of obtaining or denying any worker's compensation benefit.
(3) Intentionally make or caused to be made any false or fraudulent statements with regard to entitlement to workers' compensation benefits with the intent to prevent an injures worker from making a legitimate claim for workers' compensation benefits.

For the purposes of paragraphs (2), (3), (5), (6), (7), and (9), the term "statement" includes any writing, notice, proof of injury, bill for services, hospital or doctor records and reports, or X-ray and test results.

Respondent failed to show any statement by Petitioner that was both intentional and fraudulent regarding his working for Havner Enterprises while collecting TTD. If there was a question of Petitioner's entitlement to TTD during the days that he worked for Mr. Havner; there is a lack of evidence that he lied about this work. According to case law, Petitioner could collect TTD during the limited time that he worked for Mr. Havner. In addition, the Arbitrator notes the distinction between the trucks Petitioner drove for Havner and the trucks driven for Respondent, i.e. a flat-bed and pick-up truck versus double trailers which have to be hooked to a cab. Respondent has not proven by a preponderance of the evidence, that the petitioner committed a fraudulent act.

Lastly, Respondent attempted to admit, over Petitioner's objection, a report and deposition testimony of Ms. Mary Szczepanski. She is not a certified rehabilitation counselor. She testified that she is a certified case manager. She does not possess an appropriate certification, pursuant to the Act, that designates her as qualified to render opinions relating to vocational rehabilitation. Therefore, the Arbitrator did not admit Respondent's exhibits 11 and 12.

STATE OF ILLINOIS)
) SS.
COUNTY OF LASALLE)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEBRA LOUGHRIDGE,

Petitioner,

14IWCC0185

vs.

NO: 07 WC 45723

PETSMART, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability benefits, medical expenses, nature and extent of injuries, and permanent total disability, and being advised of the facts and law, affirms and adopts the July 22, 2013 Corrected Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission corrects the following clerical errors found within the Arbitrator's Decision:

1) On page two, section two, under "Order," the Arbitrator awarded temporary total disability benefits from February 29, 2008 through June 8, 2009. The Commission corrects this award to reflect that temporary total disability benefits are awarded from "July 25, 2007 through June 8, 2009," as indicated in body of decision, and as supported in the medical records;
2) The Commission strikes the entire blank 4th page of the Arbitrator's Decision;
3) On page one, paragraph two, sentence one, of the Arbitrator's Decision under the "Statement of Facts," the Commission corrects "July 24, 2007," to actual date of accident of "July 23, 2007;"

14IWCC0185

4) On page tone, paragraph six, sentence one, of the Arbitrator's Decision under the "Statement of Facts," the Commission corrects "with any of the adaptive annuity she stated in the office" to "without any of the adaptive annuity she stated in the office;"
5) On page two, paragraph nine, sentence one, of the Arbitrator's Decision, under the "Statement of Facts," the Commission corrects "Dr. Debra Loughridge" to "Ms. Debra Loughridge;"
6) On page three, paragraph two, sentence one, of the Arbitrator's Decision, under "Conclusions of Law," the Commission corrects "July 24, 2007" to actual date of accident of "July 23, 2007;"
7) On page four, paragraph one, sentence two, of the Arbitrator's Decision, under "Conclusions of Law," the Commission corrects "July 24, 2007" to actual date of accident of "July 23, 2007;" and,
8) On page five, paragraph one, sentences three and four, of the Arbitrator's Decision, under "Conclusions of Law," the Commission corrects "July 24, 2007" to actual date of accident of "July 23, 2007."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 22, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $68,700.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014
KWL/kmt
02/25/14
42

Kevin W. Lamborn

Thomas J. Tyrrell

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION
CORRECTED

14IWCC0185

LOUGHRIDGE, DEBRA
Employee/Petitioner

Case# 07WC045723

PETSMART INC
Employer/Respondent

On 7/22/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

1097 SCHWEICKERT & GANASSIN
SCOTT J GANASSIN
2101 MARQUETTE RD
PERU, IL 61354

3227 HOLECEK & ASSOCIATES
ANTHONY ENRIETTI
215 SHUMAN BLVD SUITE 206
NAPERVILLE, IL 60563

14IWCC0185

STATE OF ILLINOIS)
)SS.
COUNTY OF LaSalle)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
CORRECTED ARBITRATION DECISION

Debra Loughridge,
Employee/Petitioner

v.

Petsmart, Inc.,
Employer/Respondent

Case # 07 WC 45723

Consolidated cases: NONE

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **George Andros**, Arbitrator of the Commission, in the city of **Ottawa**, on September 17, 2012 and March 15, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document. **This is a corrected Award only on the nature and extent of the injury.**

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☒ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **July 23, 2007**, Respondent ***was*** operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident ***was*** given to Respondent.

Petitioner's current condition of ill-being ***is not after June 8th, 2009*** causally related to the accident. Any condition of ill being after the commencement of treatment by Dr. George De Phillips is unrelated to To the accident in the case at bar.

In the year preceding the injury, Petitioner earned **$26,311.48**; the average weekly wage was **$505.99**.

On the date of accident, Petitioner was **51** years of age, ***single*** with **no** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$22,393.87** for TTD, **$0** for TPD, **$0** for maintenance, and **$17,731.00** for other benefits, for a total credit of **$40,124.87**.

Respondent is entitled to a credit of **$27,820.89** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $377.32/week for 000 weeks, commencing February 29th, 2008 through June 8th, 2009 , as provided in Section 8(b) of the Act. On June 8th, 2009 Dr. Kuo released the Petitioner to work. The Arbitrator makes the special finding of fact that the opinions of Dr. De Phillips are not credible and not at all persuasive on any issue at bar.

Respondent shall be given a credit of $40,124.87 for compensation benefits that have been paid. No penalties are awarded under section 19 of the Act plus no legal fees are awarded.

Respondent shall pay reasonable and necessary medical services of $ 00,000.00, as provided in Sections 8(a) and 8.2 of the Act. The Respondent is liable for reasonable and necessary care only up to dates of service through June 8th, 2009, the last visit to Dr. Kuo. None of the bills of Dr. DePhillips or the bills of ancillary providers after that date including any facilities charges are the responsibility of the Respondent herein under the Workers Compensation Act.

Respondent shall be given a credit for Petitioner's group insurance and Medicare benefits paid for related bills of $27,820.89 and $92,239.74 in reductions taken, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

CORRECTION :Respondent shall pay Petitioner permanent partial disability for 250 weeks of compensation at the rate of $303.59 representing disability to the extent of fifty per cent (50 %) under section 8(d)2 .

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

CORRECTED 7/17/13
Date

JUL 22 2013

INTRODUCTION

The parties stipulate that on July 23, 2007, Petitioner was involved in a compensable work-related incident in which he sustained injury to her lower back. Temporary total disability benefits were paid, as was medical care. The dispute in this matter arose following Respondent's termination of benefits on or about June 8, 2009. The issues in this hearing include first, whether Petitioner's current condition of ill-being (or current condition of ill-being after May, 2009) is causally related to the work incident. Secondly, Respondent denies liability for any medical care after June 8, 2009. Petitioner's permanent partial disability is also at issue. Finally, Petitioner has filed a Petition for Penalties pursuant to Section 19(k), Section 19(l) and Section 16.

STATEMENT OF FACTS

It is undisputed between the parties that on July 24, 2007, Petitioner was employed by Pet Smart and working in the Ottawa Distribution Center when she sustained work-related injuries to the lower back. Petitioner was initially seen at Ottawa Community Hospital and referred out to Rezin Orthopedics. At Rezin Orthopedics, Petitioner was seen by multiple doctors, including Dr. Pulluru, Dr. Rezin, Dr. Franklin, and ultimately by Dr. Eugene Kuo. Dr. Kuo is an orthopedic surgeon and provided medical care for the Petitioner's lower back problems. Following a course of conservative medical treatment, on December 6, 2007, Dr. Kuo performed a L4-L5 hemilaminectomy on the left side, discectomy and decompression.

Following surgery, Petitioner continued to treat with Dr. Kuo. Petitioner continued to complain of pain to the lumbar spine at L4-L5 and L5-S1 level.

Dr. Kuo referred Petitioner out for a consultation with Dr. Gary Koehn who recommended continued conservative treatment at the L5-S1 level. Petitioner also began complaining to Dr. Kuo of right-sided/right leg pain.

On February 28, 2008, Dr. Kuo performed a second surgical procedure. Dr. Kuo performed an L5-S1 left revision hemilaminectomy, foraminotomy, lateral recess and decompression. Dr. Kuo's diagnosis was re-herniation at L5-S1.

On June 2, 2008, Petitioner was examined by Dr. Kuo complaining of left leg pain. Dr. Kuo could not provide a clear explanation for these problems and recommended an MRI.

On June 20, 2008, Petitioner was seen by Dr. Jerome Kolavo for an Independent Medical Examination. Dr. Kolavo diagnosed the Petitioner with lumbago, lumbar degenerative disc disease and post-laminectomy lumbar pain. In an addendum report on July 14, 2008, Dr. Kolavo opined there was a causal relationship between the Petitioner's current condition of ill-being and the work-related injury.

Petitioner continued to treat with Dr. Kuo at Rezin Orthopedics. On August 8, 2008, Dr. Kuo referred Petitioner to Dr. Carey Templin at Hinsdale Orthopaedics for a second opinion. Dr. Templin recommended an EMG followed by an isolative nerve root block at the L5 nerve root. Petitioner received the L5 selective nerve root block from Dr. Franklin at Rezin Orthopedics. Petitioner also underwent the EMG/NCV.

The study resulted in normal findings and no evidence of peripheral neuropathy, lumbar radiculopathy or plexopathy. There was no evidence of neuromuscular disease.

As of February 2, 2009, Petitioner's complaints had not changed, and the negative EMG was noted in Dr. Kuo's records. Dr. Kuo found no stenosis at L4-L5, and he had no explanation for Petitioner's ongoing complaints. Dr. Kuo recommended a functional capacity evaluation at Vital Care and for Petitioner to remain off work.

On February 16, 2009, the Petitioner underwent the functional capacity evaluation at Vital Care. The overall functional capacity evaluation test findings, in combination with the clinical observations, suggested the presence of sub-maximal effort and there was a considerable question to be drawn as to the reliability/accuracy of the Petitioner's subjective reports of pain/limitation. In conclusion, this patient/Petitioner would not be a good candidate for work hardening due to her sub-maximal effort concluding the unreliable reports of pain and presence of symptom magnification during the course of the evaluation.

On February 27, 2009, the Petitioner was again examined by Dr. Kuo, who reviewed the functional capacity evaluation reports. Dr. Kuo noted Petitioner failed at least half to two-thirds of the test questionnaires. Dr. Kuo found Petitioner to be at maximum medical improvement and released her to return to work with restrictions of no lifting more than 10 pounds, no repetitive bending, squatting, twisting or climbing, and no continuous standing and/or sitting.

On April 17, 2009, Petitioner was seen again by Dr. Jerome Kolavo for an Independent Medical Examination. Dr. Kolavo reviewed the updated medical reporting, including the functional capacity evaluation. Based on his examination and review of the medical records, Dr. Kolavo reported that Petitioner was capable of an independent exercise program with over-the-counter anti-inflammatories if needed, that she was capable of returning to full-duty work with no restrictions.

On June 8, 2009, Petitioner was again seen by Dr. Kuo at Rezin Orthopedics. During the examination, Petitioner complained of pain to the back, knee and feet. She indicated her feet felt as if they were on fire. Petitioner complained of severe knee and ankle pain when rising.

On June 8, 2009, Dr. Kuo observed the Petitioner leaving the building and demonstrating an essentially normal stride and sitting in her car with any of the adaptive annuity she stated in the office. Dr. Kuo observed as the Petitioner reached back and turned around to back her car out without any hesitation. At this point, Dr. Kuo reports, "At this point, I think that the patient should be discharged at MMI. She has no restrictions. She can follow up on an as-needed basis. All of her questions were otherwise answered." The Arbitrator adopts the opinions of Dr. Kuo as material fact in the case at bar.

After June8, 2009 Petitioner did not return to DR Kuo and later came under the care of Dr. George DePhillips. On Jan 12, 2010 Dr DePhillips performed left-sided discectomy and interbody fusion surgery with pedicle screw fixation

Petitioner continues to treat with Dr. DePhillips, receiving post-surgical therapy. Petitioner also started treating with Dr. Samir Sharma for pain management. Petitioner continues to treat sporadically with those doctors to the present time. The Arbitrator totally rejects the opinions of Drs. De Phillips and Sharma in the case at bar.

In regards to the medical treatment, Dr. Debra Loughridge testified consistent with the above summary. Petitioner testified her complaints of pain prior to the initial surgery performed by Dr. Kuo included pain to the lower back and left side, left knee and left hip. As of the date of Arbitration, Petitioner complained of center-based left-sided pain and pain down to both knees.

At Arbitration, Petitioner testified she cannot sit or stand for too long and is very limited with her work-at-home activities. At arbitration Petitioner testified to having no knowledge to the medic al reporting or testimony indicating symptom magnification and malingering as offered by Dr Kuo and Dr Kolavo. Petitioner testified to being on two narcotic pain medications
Petitioner testified that she has not attempted a return to work or job search since she was last taken off of work by Dr. DePhillips in 2009.

CONCLUSIONS OF LAW

In regards to issue (F), whether Petitioner's current condition of ill-being is caused or related to the injury; the Arbitrator finds as follows:

The Arbitrator finds the combination of four independent events beginning with the functional capacity evaluation report of February 16, 2009; medical reporting and testimony of Dr Jerome Kolavo; Dr. Kuo's examination note of June 8, 2009, and finally Petitioner's increased pain and reported disability after Dr DePhillips surgery, together are persuasive in finding as a matter of material fact and as a matter of law that Petitioner's current condition of ill-being is not related as a matter of fact and as a matter of law to the work incident of July 24, 2007.

First, the Arbitrator finds the evidence of symptom magnification and malingering was consistent through the functional capacity evaluation and Dr. Kolavo's examination. During Dr. Kolavo's second examination of the Petitioner on April 17, 2009, he could not identify objective findings consistent with the Petitioner's exaggerated complaints of pain and disability. Neurological exam resulted in normal findings, as well as the EMG and previous MRI testing. Additionally, a lumbar myelogram, which was taken on August 1, 2008 was reviewed and did not support continued herniation or nerve root impingement. While Dr Kolavo is a Respondent's section 12 examiner, following his first examination Kolavo affirmed causal connection between the work incident and her (then) condition. Dr Kolavo has demonstrated to this Arbitrator he is a credible and persuasive expert.

Additionally, the Arbitrator finds Dr. Eugene Kuo is credible and persuasive as he had been Petitioner's primary treating orthopedic for her lower back condition for a period of two years. His opinions are well written and follow her condition is a progressive fashion. Dr. Kuo had examined Petitioner on numerous occasions and performed two surgical procedures to her lumbar spine. Dr. Kuo is the medical expert who is in the best position to watch and observe Petitioner's action and determine if they were consistent with her complaints.
However, on June 8, 2009, Dr. Kuo included in his office note his objection observations of Petitioner after she left his examination room and drove away from the office. It is clear to this Arbitrator Dr. Kuo observed Petitioner demonstrating ability to walk, turn, bend and twist in a manner very inconsistent with what she had just exhibited during the examination. As a result, Dr. Kuo suddenly altered his prior restrictions, pronounced Petitioner at maximum medical improvement and returned her to work full-duty. This opinion is adopted for the IWCC Award.

This Arbitrator finds Dr. Kuo's observations and diagnoses are consistent with, and serve to support the functional capacity evaluation findings and Dr. Kolavo's opinions and testimony. Thus, the Arbitrator finds Dr Kolavo and Dr Kuo credible and more persuasive on all issues compared to the opinions expressed any other doctor involved in the workers care.

Thus, this Arbitrator finds that as a matter of fact and law, the Petitioner's condition of ill-being resulted in a medical finding of maximum medical improvement and full-duty work release as of June, 2009. Therefore, none of Petitioner's complaints, subsequent to June 8, 2009, are related to the work incident of July 24, 2007 as a matter of fact and conclusion of law.

In regards to issue (J), whether medical services that were provided to Petitioner were reasonable and necessary? Has Respondent paid all the appropriate charges for all reasonable and necessary medical services? The Arbitrator finds as follows:

As indicated above, this Arbitrator finds Petitioner's condition of ill-being ended as of June, 2009 when Petitioner's primary medical provider, Dr. Kuo, pronounced Petitioner at maximum medical improvement, i.e. stabilized and full-duty work release.

Furthermore, Petitioner's testimony serves to support the legal finding that medical care after June 8, 2010 not to be reasonable or necessary under the Act. Petitioner testified her complaints of pain after Kuo's second surgery to be across the back and down to the legs. Per the FCE and Dr Kou's initial opinion, Petitioner was release with light duty work restrictions. However, at arbitration Petitioner testified to increased pain and disability after Dr DePhillips performed a third procedure. Given the undisputed results of the third surgery it is difficult for Petitioner to argue that procedure was necessary or reasonable. The result is supportive of the opposite conclusion.

The records in evidence in the case confirm all reasonable and necessary medical treatment from July 24, 2007 through June 8, 2009 has been paid by the Respondent. Furthermore, by way of this Arbitrator's Decision on issue F, Respondent is not liable as a matter of law for payment of any medical services received by the Petitioner after June 8, 2009.

In regards to issue (K), the proper period of temporary total disability benefits paid; the Arbitrator finds as follows:

The parties have stipulated that Respondent paid temporary total disability benefits from July 25, 2007 through June 8, 2009. The Arbitrator finds as matter of fact and law that the Petitioner is entitled to temporary total disability benefits from July 25, 2007 to June 8, 2009. Respondent's liability for temporary total disability benefits ends on June 8, 2009, when the Petitioner was deemed at maximum medical improvement and received a full-duty work release. That finding is adopted herein.

In regards to issue (L), What is the nature and extent of this injury? The Arbitrator finds as follows:

Petitioner sustained a compensable work-related injury that resulted in two surgical procedures to the lumbar spine. Petitioner has not made any effort to return to work and perform a job search. First, the Arbitrator finds that as a matter of fact in law Petitioner has failed to establish that she is permanently and totally disabled as a result of the work-related injuries from July 24, 2007. Second, the Arbitrator finds Petitioner has failed to establish a claim for wage differential or loss of earnings as a result of the work-related injury of July 24, 2007. Based on the nature of the injuries sustained and the reasonable and related medical benefits received, the Arbitrator finds Petitioner has sustained permanent partial disability of 50% loss of use as the man as a whole at the rate in the Award.

In regards to issue (M), should penalties or fees be imposed upon Respondent? The Arbitrator finds as follows:

For all the reasons mentioned above, the Respondent acted in a reasonable manner at all times. Respondent made a good faith challenge to the payment of compensation. The Respondent paid all reasonable and necessary medical benefits and temporary total disability benefits. Respondent correctly and properly terminated temporary total disability benefits and medical benefits June, 2009 when Petitioner had achieved MMI status and received a full-duty work release. Penalties are denied as a matter of fact and law.

In regards to issue (N), is Respondent due any credit? The Arbitrator finds as follows:

The parties have stipulated Respondent provided advances of workers compensation payments totaling $7,235.20. Respondent deems them advancements against permanent partial disability. Respondent is to receive a credit for those payments reflected in the evidence.

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

14IWCC0186

Carl Levitt,
Petitioner,
vs.

NO: 10 WC 28771
10 WC 28772

Sun Chemical Corp,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, permanent partial disability, medical expenses, notice and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014
KWL/vf
O-2/25/14
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

14IWCC0186

LEVITT, CARL
Employee/Petitioner

Case# **10WC028771**

10WC028772

SUN CHEMICAL CORP
Employer/Respondent

On 8/29/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.06% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

3123 ROBERTS PERRYMAN PC
JASON GUERRA
1034 S BRENTWOOD SUITE 2100
ST LOUIS, MO 63117

0581 LAW OFFICE OF NICHOLAS M BIGONESS
1010 JORIE BLVD
SUITE 134
OAK BROOK, IL 60523

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION 14IWCC0186

Carl Levitt
Employee/Petitioner

v.

Sun Chemical Corp.
Employer/Respondent

Case # 10 WC 28771

Consolidated cases: 28772

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Mount Vernon**, on **July 11, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☒ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other ___

FINDINGS

On **4/7/08 and 4/8/08**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was not* given to Respondent.

Petitioner's current condition of ill-being *is not* causally related to the accident.

In the year preceding the injury, Petitioner earned **$40,071.58**; the average weekly wage was **$770.61**.

On the date of accident, Petitioner was **55** years of age, *married* with **0** dependent children.

Petitioner *has* received all reasonable and necessary medical services.

Respondent *has not* paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $ for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Having failed to prove that Petitioner sustained an accidental injury arising out of and in the course of his employment with the Respondent on April 7, 2008, and April 8, 2008, and that timely notice of either alleged accident was not given to Respondent, all claims for compensation are hereby denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/23/13
Date

AUG 2 9 2013

FINDINGS OF FACT

Petitioner testified that he works as a batchmaker for Sun Chemical, a producer of printing ink. He was assigned to 3Z Printing in Teutopolis where he would mix the inks for the customer in their processing plant. The Petitioner worked the third shift, and he reported to his supervisor, Vernon Ruholl, who worked the first shift.

Petitioner testified that he injured his neck on two consecutive days "around" April 7, 2008, and April 8, 2008, while changing a tote bin. He testified that on April 7, 2008, he "felt something pop" and on the next day, April 8, 2008, he again felt a pop in his right shoulder with pain going down his right arm.

Petitioner testified that he reported both injuries to his supervisor, Vernon Ruholl, on the dates they occurred.

Petitioner first saw medical attention more than 3 weeks after the alleged injuries when he saw his family physician, Dr. Sean Flynn, on May 1, 2008. During that first visit Dr. Flynn noted Petitioner's complaints of pain in his neck, right shoulder and right arm, and that Petitioner had recently golfed. There was no history of an injury at work reported to Dr. Flynn. (PX 3) Dr. Flynn referred the Petitioner to Dr. B. Heshmatpour, an orthopaedic, who first examined the Petitioner on May 9, 2008.

On May 8, 2008, the Petitioner filled out a Patient Information form, in which he listed his address, employer, date of birth and other preliminary information. (PX 4) One of the questions contained therein asked, "Is condition due to an accident?" and the Petitioner responded "No". A space for the "Date of Accident" was left blank. Another question asked "Where did accident occur?" and even though "Work" was a suggested answer on the form, the Petitioner responded with a question mark. The Petitioner acknowledged he filled out this form and signed it. There was no report of a work injury.

Another Patient Information form was prepared by one of Dr. Heshmatpour's assistants. (PX 5) The Petitioner testified that he was asked a series of questions by the assistant prior to seeing Dr. Heshmatpour, and these questions included his address, employer, referring physician, medications, and other preliminary information. He acknowledged that this information was important, especially the medical information, as this would assist the doctor in his diagnosis. These records indicate that Petitioner told the assistant his primary problem was with the right side of his neck, shoulder and arm, and when asked "How Injury Occurred" the records state: "golfing". There was no report of a work injury. Dr. Heshmatpour's records include an Initial Office Evaluation report of the May 9, 2008, visit, and in his first paragraph he states:

> This is a 56-year-old male patient of Dr. Flynn who presents to our office today. He has worked for a printing company for the past 30+ years on an offset machine and does a lot of bending and using his upper extremities. He states he injured his neck and right arm golfing three to four weeks ago. (PX 6)

Petitioner did not report any type of work injury to Dr. Heshmatpour. Dr. Heshmatpour ordered an MRI, which revealed multilevel broad-based spur/disc complexes and accompanying cervical spondylosis resulting in multilevel foraminal encroachment as well as mild to moderate central canal stenosis. Dr. Heshmatpour prescribed a cervical epidural block and referred the Petitioner to Dr. Neill Wright, a neurosurgeon.

Petitioner was examined by Dr. Wright on May 22, 2008, and stated to the doctor that he had neck and arm pain. The Petitioner told Dr. Wright that he had been having this problem for 10 years off and on. He told Dr. Wright that he had flare-ups of pain off and on ever since, and that approximately one month prior the pain began to extend more severely down his right arm to the elbow. Petitioner did not report any type of work injury to Dr. Wright. Petitioner was diagnosed with degenerative disc disease at C5-C6 with bilateral foraminal stenosis and subsequently underwent an anterior cervical discectomy and fusion on July 22, 2008. Following the surgery, Dr. Wright monitored the Petitioner's progress and on January 21, 2009, noted that the Petitioner had some minor neck stiffness, but no arm complaints. The Petitioner was back at work without restrictions. Dr. Wright noted that the Petitioner was doing very well and would follow up on an as-needed basis.

Tony Althoff was called to testify on behalf of Petitioner. Mr. Althoff, a 3Z Printing employee, testified that he worked third shift and was present on April 8, 2008, when Petitioner informed Respondent supervisor Vernon Ruholl that he had injured his shoulder and neck. Mr. Althoff testified that when Mr. Ruholl heard Petitioner's statement, Mr. Ruholl said nothing. Mr. Althoff testified that he was unaware that the Petitioner had injured his shoulder and neck the previous day.

Petitioner called Raymond Cohen, D.O. to testify via evidence deposition. Dr. Cohen did not treat Petitioner, but performed an examination on January 25, 2011. Dr. Cohen opined that Petitioner's "injuries were work-related based on the description that Mr. Levitt provided to me from what he was doing at work on those two days…".

Vernon Ruholl was called to testify on behalf of Respondent. Mr. Ruholl testified that he works for Sun Chemical on the first shift at the 3Z Printing facility, and that he is Petitioner's supervisor. Mr. Ruholl denied that Petitioner ever reported any type of work injury to him in April, 2008, let alone two injuries in two consecutive days. Mr. Ruholl testified that it is his responsibility to fill out an accident report for any Sun Chemical employees who inform him, and that it would be a serious violation of company rules if he failed to do so. Mr. Ruholl testified that he did recall that at some time in April, 2008, the Petitioner told him his shoulder was bothering him, but that Petitioner never said it had anything to do with work so Mr. Ruholl did not inquire further. Mr. Ruholl testified that Petitioner applied for, and received, short term disability benefits which could not have been paid if the Petitioner had been injured at work. Mr. Ruholl testified that the first he learned of Petitioner's accident claim in January, 2010, when he received a Sun Chemical Incident Report Form 787 from his supervisor, Joe Halter. PX1.

CONCLUSIONS OF LAW

1. Regarding the issue of accident, the Arbitrator finds that the Petitioner failed to meet his burden of proof. In support of that finding, the Arbitrator relies on the Petitioner's treating medical records, which indicate the Petitioner complained of arm pain from playing golf. These records are bereft of the Petitioner mentioning an injury while working. It is quite incredible that the Petitioner was able to describe in detail 5 years after the alleged accident date at the arbitration hearing how he hurt his shoulder while pushing bins, yet there is no mention of this activity in the medical records taken within the month after the alleged occurrences. All of these factors support the Arbitrator's finding that the Petitioner's testimony lacked credibility. Accordingly, the Petitioner's claim is denied.

2. Based on the Arbitrator's findings regarding the issue of accident, all other issues are rendered moot.

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Alvarez Enrique,
Petitioner,
vs.

14IWCC0187

NO: 07 WC 25207

Burch Services,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of permanent partial disability, temporary total disability, wage differential benefits and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 1, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall have credit for all amounts paid, if any, to or on behalf of the Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014
KWL/vf
O-12/17/13
42

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ALVAREZ, ENRIQUE
Employee/Petitioner

Case# **07WC025207**

14IWCC0187

BURCH SERVICES
Employer/Respondent

On 4/1/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

2044 ALVARO COOK LTD
149 S LINCOLNWAY
SUITE 200
NORTH AURORA, IL 60542

0507 RUSIN MACIOROWSKI & FRIEDMAN LTD
HEATHER L BOYER
10 S RIVERSIDE PLZ SUITE 1530
CHICAGO, IL 60606

STATE OF ILLINOIS)
)SS.
COUNTY OF KANE)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

ENRIQUE ALVAREZ
Employee/Petitioner

v.

BURCH SERVICES
Employer/Respondent

Case # 07 WC 25207

Consolidated cases: _

14IWCC0187

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator George Andros**, Arbitrator of the Commission, in the city of **Geneva**, on **12/13/12**. By stipulation, the parties agree:

On the date of accident, **09/11/06**, Respondent was operating under and subject to the provisions of the Act.

On this date, the relationship of employee and employer did exist between Petitioner and Respondent.

On this date, Petitioner sustained an accident that arose out of and in the course of employment.

Timely notice of this accident was given to Respondent.

Petitioner's current condition of ill-being is causally related to the accident.

In the year preceding the injury, Petitioner earned **$31,527.60**, and the average weekly wage was **$606.30**.

At the time of injury, Petitioner was **33** years of age, ***single*** with **1** dependent children.

Necessary medical services and temporary compensation benefits have been provided by Respondent.

Respondent shall be given a credit of **$47,996.94** for TTD, **$352.79** for TPD, **$52,026.28** for maintenance, and $ for other benefits, for a total credit of **$100,376.01**.

After reviewing all of the evidence presented, the Arbitrator hereby makes findings regarding the nature and extent of the injury, and attaches the findings to this document.

ORDER

Respondent shall pay Petitioner the sum of $338.41/week for the duration of disability, as provided in Section **8(d)(1)** of the Act, because the injuries sustained resulted in a wage differential/impairment **of earnings**.

Respondent shall pay Petitioner wage differential benefits that have accrued from **10/05/10** through **12/13/12**, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $47,996.94 for TTD, $352.79 for TPD, and $52,026.28 for maintenance benefits, for a total credit of $100,376.01 which shall not reduce the wage differential awarded.

Respondent shall pay pursuant to the fee schedule medical expenses from Dreyer Medical Clinic for dates of service 11/07/06 and 12/05/06 as well as Elmhurst Memorial Hospital for date of service 11/08/07.

Respondent shall be given a credit of $583,145.94 for medical benefits that have been paid.

RULES REGARDING APPEALS Unless a Petition for Review is filed within 30 days after receipt of this decision, and a review is perfected in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

#01 George J. Andros
Signature of Arbitrator

March 29, 2013
Date

ICArbDecN&E p.2

APR 1 - 2013

FINDINGS OF FACTS & CONCLUSIONS OF LAW 07 WC 25207

The petitioner was hired by the respondent as an HVAC installer on May 31, 2006. His job duties included removal of old furnaces and air conditioning units and installation of new furnaces and air conditioners. As part of his job he also fabricated connections to the HVAC units with sheet metal including the installation of plenum and heating ducts. His activities involved kneeling, climbing, carrying, lifting, bending and stooping.

On September 11, 2006, the petitioner was preparing to install an air conditioning unit on the roof of a building in Aurora, Illinois. As he was climbing a ladder he fell approximately 23 feet and landed on the pavement. He sustained numerous injuries to his right arm, left arm, right leg and right hip. He was transported to Provena Mercy Medical Center in Aurora where he underwent several surgeries to repair fractures of his right arm, left arm, right leg and right hip.

The petitioner was in an off work status after his accident. After the surgeries he underwent extensive physical therapy, and was released by Dr. Jacobs-El in June of 2008, with restrictions that limited the use of his right arm, limited his ability to climb, bend, twist, and prohibited stooping and kneeling.

Due to his restrictions, the petitioner was unable to return to his previous occupation involving HVAC installation. He returned to work for the respondent performing clerical duties for approximately two weeks after which time no further light duty was available. The petitioner began a job search with the assistance of David Patsavas of Independent Rehabilitation Services which was hired by the respondent to provide vocational services. His direction is in high regard by the Arbitrator. The petitioner also enrolled in several courses at Waubonsee Community College which were paid for by the respondent.

The petitioner through his own job search efforts obtained employment at Melt Design, Inc. He worked for MDI for several weeks but required hospitalization for treatment of diabetes. Upon his release from the hospital his employment with MDI was terminated.

Thereafter, petitioner required further treatment of the injuries sustained in the accident of September 11, 2006. He underwent multiple surgeries in 2008 and 2009 of his arms and right hip. During that time the petitioner was in an off work status and receiving temporary total disability benefits paid by the respondent. On August 28, 2009, he was released by Dr. Lamberti who had performed surgery on the petitioner's right elbow.

Dr. Lamberti released the petitioner with a permanent five pound lifting restriction that prohibited pushing, pulling or grasping with his right arm (PEX #3). On October 5, 2009, the petitioner was released by Dr. Jacobs-El with permanent restrictions that prohibited climbing ladders greater than 15 feet, avoid crouching, kneeling and squatting (PEX #2).

The petitioner testified that given his restrictions he was not able to return to his previous occupation of HVAC installation and technician. Thereafter, the petitioner began a job search within his restrictions. Petitioner testified that he was interviewed and tested by Steven Blumenthal a certified vocational counselor. Mr. Blumenthal recommended that he enroll in classes to obtain a degree in computer assisted drafting and design. The petitioner was enrolled at Joliet Junior College to complete an associate's degree in computer assisted design and drafting (CADD). The petitioner's tuition and expenses were paid by the respondent and he received maintenance benefits throughout the time he was attending school.

The petitioner testified that he did not entirely finish the program and still required three courses to obtain the associate's degree in CADD. He was unable to complete the CADD program because he found employment with Chemtech Plastics working as a CADD engineer. He began work in October, 2011. He was initially hired earning a salary of $34,000.00 - $35,000.00 per year. The petitioner testified that he continued to be employed by Chemtech Plastics as a CADD engineer and was earning a $40,000.00 salary at the time of hearing.

Angela Howard testified for the respondent. Ms. Howard was the former director of Burch Services, Inc. Her duties included handling the payroll. She testified that the petitioner was earning $15.00 per hour approximately $600.00 per week at the time of his injury. Ms. Howard testified that the petitioner was employed as an HVAC installer not as a service technician. Ms. Howard further testified that on the date of injury the most experienced HVAC technicians and service technicians were earning approximately $20.00 per hour. She testified that an HVAC installer was considered experienced after five years on the job. Ms. Howard testified that Burch Services provided on the job training as well as classes for certification in various skills in the industry to all employees. Ms. Howard further testified that the petitioner was a good employee and was progressing well in developing the skills of his trade. She testified that Burch Services, Inc. is no longer in business and had been closed since November, 2010. Much of the testimony regarding his pattern of wage payments and earnings long with some discussions seemingly to spar about whether he was an HVAC installer compared to a service technician required intent listening at the hearing but are not particularly probative in the outcome.

The petitioner testified as to his current limitations with respect to lifting, bending and stooping. He testified his understanding restrictions placed on him by Dr. Jacobs-El and Dr. Lamberti were permanent. The arbitrator had the opportunity to view the petitioner's arms and noted excess bone growth in both arms, deformity of the arms and disfigurement related to surgical incisions. The petitioner testified that it was his intent to continue in the HVAC field had he not been injured and that it was the trade he was pursuing prior to his accident.

CONCLUSIONS OF LAW

Nature and Extent

The petitioner alleges that he has sustained a diminishment in earning capacity compensable under Section 8(d)(1) of the Act. Section 8(d)(1) states as follows:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall, except in cases compensated under the specific schedule set forth in paragraph (e) of this Section, receive compensation for the duration of his disability, subject to the limitations as to maximum amounts fixed in paragraph (b) of this Section, equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident."

The words used in a statute are to be given their plain and commonly understood meaning and where the language of the statute is clear and unambiguous, the courts are obligated to enforce the law as enacted by the legislature, Forest City Erectors v. Industrial Commission, 264 Ill. App. 3d 436, 636 N.E.2d 969. The Arbitrator must apply the law of the Court and thus adopts Forest City as a leading case on complex issues in wage differential calculations as a matter of law. The Petitioner elected to proceed under 8(d)1.

The plain language of Section 8(d)(1) prohibits an arbitrator or the commission from awarding a percentage of a person as a whole award where the claimant has presented sufficient evidence to show a loss of earning capacity. The court in Gallianetti v. Industrial Commission ruled that the use of the word "shall" in Section 8(d)(1) meant that the commission was without discretion to award anything other than a wage differential award where a claimant proves he is entitled to benefits under Section 8(d)(1) unless a claimant waives his right to recover under that section. To qualify for a wage differential benefit, an employee must establish (1) a partial incapacity that prevents him from pursuing his "usual and customary line of employment" and (2) an impairment of earnings. Gallianetti, 315 Ill .App. 3d 721, 734 N.E.2d 482.

The wage differential is to be calculated on the presumption that, but for the injury, the employee would be in the full performance of his duties. Old Ben Coke Company v. Industrial Commission, 198 Ill. App. 3d 485, 555 N.E.2d 1201.

Prior to 1975 Section 8(d)(1) stated that a wage differential award should be based on a percentage of the difference between the "average amount which claimant earned before the accident and the average amount which a claimant is earning or is able to earn in some suitable employment or business after the accident". Illinois Rev. Stat. 1973, Chapter 48, par. 138.8 (d) (1) Public Act 79 which became effective on July 1, 1975, inserted the phrase "average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident" in place of the phrase "the average amount which he earned before the accident".

In General Electric v. Industrial Commission, the appellate court interpreted the 1975 amendment to the Act by strictly applying the language of the amendment which states that the Commission should calculate wage differential awards based on the amount that a claimant "would be able to earn" at the time of the hearing if the claimant were able to fully perform the duties of the occupation in which he was engaged at the time of the accident. The court found that there was no evidence suggesting that the claimant would not still be employed in the same job classification if she had not been injured and affirmed the decision of the commission which had based the wage differential award to the claimant on the amount the claimant **would have been earning at the time of hearing.** The court ruled that diminution in earning capacity is calculated by deducting a claimant's current wages from the amount that the claimant would have earned at the time of the hearing in the occupation the claimant had prior to the accident. General Electric v. Industrial Commission, 144 Ill. App. 3d 1003, 495 N.E.2d 68.

Respondent offered the testimony of Angela Howard who was the former director of Burch Services, Inc. and very articulate with excellent recollection given her family ties to the Respondent.

Ms. Howard testified that the petitioner was earning approximately $600.00 a week was working as an entry level assistant HVAC installer at the time of the accident. She further testified that technicians were paid more than installers and that it would take approximately five years for an installer to be considered experienced enough to earn technician wages. She further testified that classes were offered to all employees including the petitioner in order to obtain the training and certificates required to maintain current knowledge in the industry and increase wages. Ms Howard acknowledged that her company paid less than other HVAC companies but offered steady hours. She further testified that the petitioner took courses required by the company, was a good employee and progressing in the attainment of knowledge and experience in the industry. Ms. Howard testified that Burch Services closed in November of 2010 and had not since reopened that business (entity).

The testimony of Ms. Howard as to the petitioner's earnings in the year prior to the accident -- more than six years prior to the hearing -- is not significantly probative and definitely not determinative of the amount the petitioner would be able to earn in the full performance of his occupation at the time of hearing. See the plain language of the statute this Arbitrator must follow in matters of law as in the case at bar.

The petitioner presented the testimony of Steven Blumenthal, a certified rehabilitation counselor and vocational evaluation specialist (PEX #7). His credentials are exemplary. Mr. Blumenthal testified that he reviewed the petitioner's medical records, personally interviewed the petitioner and obtained work history information from him. The information obtained in his interview revealed that the petitioner had attended school at Waubonsee Community College in 2006 to take classes in HVAC and had training on the job and from Waubonsee Community College. The petitioner also had a CFC certificate through the State of Illinois after completing training in the use of refrigerants.

Mr. Blumenthal recommended that the petitioner attend courses to obtain an associate's degree in computer aided drafting and design. Mr. Blumenthal testified that the petitioner would not be able to return to work in the HVAC field given his permanent restrictions (PEX #7 p. 22 - 23). Mr. Blumenthal also testified that the petitioner would not be able to return to any of the jobs the petitioner had held prior to his accident (PEX #7 p. 23). Mr. Blumenthal testified that if the petitioner were still employed as an experienced HVAC worker he would be earning $31.92 an hour or $66,396.00 a year according to the Illinois Department of Employment Security Wage data for the Chicago, Naperville, Joliet, Illinois metropolitan area.

Mr. Blumenthal testified that the Illinois Department of Employment Security Wage data was information commonly relied upon by vocational rehabilitation counselors in determining wages in a particular field and that that agency was considered authoritative on the subject matter (PEX #7 p. 25). Mr. Blumenthal's testimony on direct examination is adopted as material findings of fact as to the subject matter therein.

On well informed and insightful cross-examination Mr. Blumenthal testified that an HVAC worker would be considered experienced thus qualifying for an hourly wage of $31.92 per hour after a three to four year period of working in the field (PEX #7 p. 46 – 47, p. 49 – 50).

The plain language of the statute does not limit an award of 8(d)(1) to what the petitioner would be earning with the respondent or a particular employer. The statute clearly states that the basis for calculation of compensation is what the petitioner would be able to earn in the full performance of his duties in the **occupation** in which he was engaged at the time of the accident. Emphasis added.

The petitioner established that his occupation was full-time HVAC installation at the time of the accident. Due to the severity of his injuries and his permanent restrictions he was unable to pursue his usual and customary line of employment. Had he continued to work as an HVAC installer he would have more than six years of experience in the field at the time of hearing. The testimony of Mr. Blumenthal as to earnings in the field based on Illinois wage data is far more persuasive and based upon a broad knowledge of such matters as compared to the sincere and articulate presentation by Ms. Howard of the Respondent at bar.

The petitioner testified that at the time of hearing that he was earning $40,000.00 a year salary working for Chemtech Plastics as a CADD engineer. The difference between the $66,396.00 a year that the petitioner would be earning as an experienced HVAC worker and the $40,000.00 he is currently earning in suitable employment as a CADD engineer is $26,396.00/$507.62 per week.

Based upon the totality of the evidence and a plain reading and application of the statute at the time of the accident, The arbitrator finds as a matter of material fact and as a conclusion of law the Petitioner at bar is entitled to the payment of two thirds of that sum which is $338.41 per week for the duration of his disability.

Medical expenses

The parties have stipulated on the record that all medical treatment received was necessary. The respondent agreed to pay the bills outlined in the addendum to the request for hearing form pursuant to the fee schedule. The arbitrator hereby orders the following bills to be paid or satisfied pursuant to the fee schedule and all adopted rules and regulations their under:

Dreyer Medical Clinic D.O.S. 11/07/06 & 12/05/06	$238.00
Elmhurst Memorial Hospital D.O.S. 11/08/07	$160.00

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

☒ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Timothy Hubbs,

Petitioner,

14IWCC0188

vs.

NO: 13 WC 3722

Continental General Tire,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 12, 2013 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

14IWCC0188

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $9,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 17 2014
KWL/vf
O-12/3/2014
14

Kevin W. Lamborn

Daniel R. Donohoo

Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b) DECISION OF ARBITRATOR

14IWCC0188

HUBBS, TIMOTHY
Employee/Petitioner

Case# **13WC003722**

CONTINENTAL GENERAL TIRE
Employer/Respondent

On 6/12/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.08% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0355 WINTERS BREWSTER CROSBY ET AL
THOMAS CROSBY
PO BOX 700 111 W MAIN ST
MARION, IL 62959

0299 KEEFE & DEPAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

14IWCC0188

Timothy Hubbs
Employee/Petitioner

v.

Continental General Tire
Employer/Respondent

Case # 13 WC 3722

Consolidated cases: ___

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Granada**, Arbitrator of the Commission, in the city of **Herrin**, on **5/14/2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Reasonableness and Necessity of Future Medical Care**

14IWCC0188

FINDINGS

On the date of accident, **8/4/2012**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned **$7,860 (11.8 weeks)**; the average weekly wage was $666.17.

On the date of accident, Petitioner was **48** years of age, *single* with **0** dependent children.

Respondent *has not* paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$0**.

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $444.11/week for 16 weeks, commencing 1/23/13 through 5/14/13, as provided in Section 8(b) of the Act.

Respondent shall pay all related, reasonable and necessary medical services of $2,657.45, subject to the fee schedule, as provided in Sections 8(a) and 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

6/11/13
Date

ICArbDec19(b)

JUN 12 2013

Findings of Fact:

Petitioner, Timothy Hubbs testified regarding his job history as a welder in the mining industry prior to his employment with Respondent; the mechanism of injury and symptoms of the accident of August 4, 2012 (Respondent does not dispute accident); medical care received from Respondent and the Petitioner's treating doctors; termination by Respondent due to his physical inability to meet mandatory production quotas; his attempt to return to employment as a welder after being terminated by Respondent; and his current condition of ill-being. Petitioner is a resident of Marion, Illinois who was employed with Respondent from April 30, 2012 until October 31, 2012. Prior to coming to work for Respondent, Petitioner had a 25 year history as a welder in the mining industry and until April 2012, had been employed by Peabody Coal in Wyoming. Petitioner moved back to Illinois to be closer to his family.

Respondent has stipulated Petitioner injured his shoulder at an accident at work on August 4, 2012. Petitioner worked as a truck tire builder for Respondent. He worked in tandem with a co-worker and assembled truck tires in a two stage process. Petitioner's task was to feed rubberized steel belting from a 300-500 roll (breaker) into a splicing/rolling machine. Petitioner was required to move and align the heavy breaker cart with a roller, and slide the cart into the tire assembler. Once in the assembler, the breaker's steel belting is fed into the machine and is stretched around a drum and bonded into the shape of a tire. The formed tire belts are matched to a tire carcass (assembled and delivered from the co-worker) and the steel belting is machine pressed into the carcass and inflated. After the breaker's steel belting is used, the Petitioner removes the breaker cart and inserts a fully loaded breaker into the machine. During the second part of the shift, Petitioner and his co-worker switched jobs. Petitioner and his shift co-worker had a mandatory shift production quota for both the quantity and quality of tires produced. To meet the shift quota, both workers had to work at full capacity.

On August 4, 2012 Petitioner misaligned a full breaker, using both arms he jerked the cart toward him to realign it onto the roller that slid the breaker cart into the correct position in the tire assembler. Petitioner testified when he jerked back, he felt a pop and burning pain that extended from his left upper bicep into the back of his shoulder. Petitioner's co-worker and supervisor knew Petitioner had injured his left shoulder and his supervisor instructed Petitioner to report to Respondent's Health Service for medical care. Petitioner reported his injury and described the pain in his shoulder to the Health Service LPN, who offered to ice Petitioner's shoulder for the balance of the shift and requested that Petitioner see the company doctor after finishing his shift the next day. Petitioner declined the offer to ice his shoulder and asked to return to work, stating his pain had lessened. On August 5, 2012 after his midnight to 7:00 a.m. shift, Petitioner reported to Respondent's Health Service and saw that a number of other employees were waiting to see the doctor. Petitioner was informed the doctor would not arrive for an hour, so Petitioner chose to leave hoping the shoulder problem would work itself out. The Health Service nurse encouraged him to return if the shoulder pain persisted.

After the August 4, 2012 accident, Petitioner testified that he could not hold any weight in his left hand with his arm extended away from his body. Petitioner testified that reaching out to lift a glass of tea or raising and holding a phone to his ear could result in the onset of numbness in the left hand and shooting pain to the shoulder. Hoping the shoulder injury would resolve with time, Petitioner continued to work regular duty. Petitioner could no longer move a loaded breaker cart using his left arm and his worked slowed due to the difficulty in positioning and docking the breakers while using only his right arm.

Due to his continuing inability to push and lift with his left arm, on September 13, 2012, Petitioner sought care from Dr. James Alexander, who had been Petitioner's personal medical doctor of fifteen years. Petitioner provided a detailed history of the August 4, 2012 accident. Dr. Alexander questioned if he had any

other incidents of pain in his left shoulder prior to the work accident. Petitioner was aware that Dr. Alexander is a contract company physician for nine local coal mines. (Pet. Ex. 6-12, Ex. A to Dr. Alexander Dep.). Petitioner stated he had experienced left shoulder pain which had resolved after a short period when he moved some items into storage for his daughter on July 27, 2012. Petitioner told Dr. Alexander that while using a two wheel dolly to move an empty chest freezer, he titled the dolly up with his right arm and guided the chest with his left arm fully extended. Petitioner reported he felt a pain in his left shoulder that resolved before he moved the next load. Dr. Alexander told Petitioner that his left shoulder had been injured by the earlier event and the Doctor suspected that Petitioner had torn his rotator cuff when he pulled on the heavy breaker cart. Dr. Alexander told Petitioner to request Respondent's company doctor to get an MRI to determine if he had a torn rotator cuff. On September 15, 2012 after completing his next shift, Petitioner presented to Respondent's Health Service and reported that his left shoulder condition had not improved and that holding his left arm up with anything in his left hand could cause episodes of shooting pain into his left shoulder or numbness radiating from his shoulder down to his left hand. Petitioner reported to Respondent's Health Service nurse that Dr. Alexander suspected Petitioner had torn his rotator cuff in the August 4, 2012 accident and that he needed an MRI. (Pet. Ex. 6-43, Ex. D to Dr. Alexander Dep.). The Health Service nurse scheduled Petitioner an appointment for the company doctor, Dr. Bleyer, after his shift on September 17, 2012.

Petitioner told Dr. Bleyer of the August 4, 2012 pulling injury to his left shoulder caused by jerking the breaker cart and about the pain and numbness he experienced since the work accident (Pet. Ex. 6-44, Ex. D to Dr. Alexander Dep.). Petitioner also told Dr. Bleyer about Dr. Alexander's suspicion that Petitioner had suffered a rotator cuff tear and that he needed an MRI. Respondent's doctor did not order or approve an MRI of the left shoulder. Respondent's doctor prescribed three weeks of physical therapy with Respondent's contracted physical therapy provider, Work-Fit and continued Petitioner on regular work (Pet. Ex. 6-45, Ex. D to Dr. Alexander Dep.). On October 5, 2012, Work Fit physical therapists halted Petitioner's physical therapy because he had no improvement (Pet. Ex. 6-50, Ex. D to Dr. Alexander Dep.). When Petitioner halted therapy, the Work Fit physical therapist noted Dr. Alexander's impression of a possible rotator cuff tear and request for MRI. (Pet. Ex. 6-46, Ex. D to Dr. Alexander Dep.). On October 8, 2012, after the prescribed physical therapy was halted, Petitioner had another consultation with Respondent's contract doctor. Petitioner was seen at by Dr. Colon at Health Service. Petitioner expressed that he still experienced pain and numbness if he held anything and lifted his left arm. Dr. Colon's assessment note indicated the doctor's uncertainty whether the painful restriction to left shoulder movement was caused by a labrum tear or tendinitis. Dr. Colon did not approve or order the MRI, but sent Petitioner for x-rays and allowed him to continue regular work (Pet. Ex. 6-46, 6-56, Ex. D to Dr. Alexander Dep.).

Petitioner testified that being unable to lift or push the breaker cart combined with his left shoulder restrictions that he could not meet his shift production quota. Petitioner received multiple warnings of quota deficiencies and was terminated on October 31, 2012 for inability to meet quota. Upon being fired by Respondent, Petitioner immediately applied for work as a welder with CCC Services, a mining equipment company, assembling a drag line in North Carolina. Petitioner commenced work as a welder in North Carolina on November 7, 2012. Petitioner continued to seek authorization from Respondent for the MRI Dr. Alexander said was needed to diagnose and treat his work related shoulder injury. Petitioner testified that in order to meet his financial obligations; he had no choice but to work as a welder while waiting for medical treatment for his left shoulder. Petitioner testified that during the five weeks (11/7/12 -12/22/12) he worked as welder he remained unable to support weight in his left hand unless his arm was hanging straight down, fully extended, below his shoulder. Petitioner testified he was able to work as a welder despite restricted use of his left arm by

supporting his left arm on his body and using it to help guide the welder. Petitioner was hired to help assemble a multi-story dragline to be used to remove overburden in surface coal mines. Petitioner operated a wire fed welder which he held in his dominant right hand. Petitioner's job was to reassemble the metal plates that made up the 50 foot round metal platform that the dragline was erected on, called the "tub". The tub was metal walls that curve inward and rise almost six feet above the metal floor. The tub is divided into compartments. Petitioner testified he worked alone in a section of the tub welding floor and wall seams. The schedule of the work required Petitioner to weld together the floor and lower wall seams of tub. In order to enter the tub, Petitioner had to climb down a short ladder and carry a bucket of tools and his 30 pound welder. Petitioner testified the weakness and painful motion of his left shoulder prevented him from lifting with his left arm. In order for Petitioner to carry his equipment into the tub, he had to use his right arm to reach out to lift his tool bucket onto the ladder. Petitioner described that would hold and operate the wire welder with his dominant right hand and used his left hand only to help guide the welder. Petitioner described how he had to anchor his left elbow on his leg or knee to support the weight of his left arm so that his left hand could steady and guide the welder he held in his right hand. By bracing his left arm first on his leg while sitting on the floor welding floor seams and then sitting on a bucket and bracing his left elbow on his knee Petitioner was able to use both hands to weld until the height of the wall seam prevented using a braced left arm, at which point, he guided and operated the welder with his right hand alone. Petitioner did not have any quota or time limit on his welding as solid quality welds were his employer's priority. On December 22, 2012 Petitioner informed his North Carolina employer that he would be seeking medical treatment for his left shoulder and would need additional time off after the holidays.

On January 18, 2013, after returning to Illinois, Petitioner made an out of pocket cash payment to get an MRI of his left shoulder at InMed Diagnostics. (Pet. Ex. 6-26, Ex. B to Dr. Alexander Dep.). The MRI revealed a full thickness tear of the rotator cuff (Pet. Ex. 6-26, Ex. B to Dr. Alexander Dep.). In consultation with Dr. Alexander, Petitioner was referred to an orthopaedic surgeon, Dr. J.T. Davis, of Orthopaedic Institute of Southern Illinois (Pet. Ex. 6-29, Ex. C to Dr. Alexander Dep.). On January 23, 2013, Dr. Davis placed a left hand/arm light weight restriction with no overhead work on Petitioner until surgical repair of the rotator cuff was approved and completed (Pet. Ex. 6-33, Ex. C to Dr. Alexander Dep.). Upon informing his employer in North Carolina of the medical restrictions, Petitioner was informed he would not be allowed to work until released to full duty work. Petitioner's testimony was credible and consistent with the medical records.

MEDICAL EVIDENCE:

Deposition of James Alexander, M.D. Dr. Alexander is a board certified family practitioner who is also a company doctor for nine local coal mines (Pet. Ex. 6-12, Ex. A to Dr. Alexander Dep.). Dr. Alexander has been Petitioner's primary care doctor for over fifteen years (Pet. Ex. 6-11, pgs. 42-43 to Dr. Alexander Dep.). Dr. Alexander's office had prior to the August 4, 2012 accident treated Petitioner for symptoms caused from minor arthritic changes in his shoulders bi-laterally. Dr. Alexander's records show that while seeking treatment for sinus problems in early July 2012, Petitioner had complaints of achiness in his shoulders (Pet. Ex. 6-16, Ex. B to Dr. Alexander Dep.). Dr. Alexander's nurse practitioner injected both shoulders with Xylocaine (Pet. Ex. 6-2, p.7, lines 23-25). Petitioner testified he had in the past received two shots for arthritis in the AC joint region of his right shoulder, but had never before July 2012 received a shot in the left shoulder. Petitioner

testified that the shots resolved the arthritic symptoms immediately and that he had no pain in his left shoulder when he pulled on the breaker cart and injured his left shoulder on August 4, 2012. Dr. Alexander's office notes reflect Petitioner gave a history of a July 27, 2012 incident which caused temporary left shoulder pain when Petitioner moved a freezer with his left arm extended (Pet. Ex. 6-19, Ex. B to Dr. Alexander Dep.). Dr. Alexander opined that the transitory shoulder pain at the time of moving the freezer probably caused tendon inflammation in the left shoulder. However, Dr. Alexander agreed with Dr. Davis's assessment that the August 4, 2012 push/pull accident with belt-breaker cart that resulted in the immediate onset of shoulder pain, shooting pain and numbness and loss of function of the left arm was the medical cause of the rotator cuff tear. (Pet. Ex. 6-5, p. 20, lines 15-20). Dr. Alexander testified neither the shoulder arthritis nor moving the freezer caused the rotator cuff tendon rupture (Pet. Ex. 6-5, p. 20, lines 15-21). After the push/pull work accident, Petitioner complained of on-going left hand weakness, numbness and pain shooting from the left shoulder into the left arm, which symptoms supported Dr. Alexander's impression that Petitioner tore his rotator cuff while jerking the breaker cart. Dr. Alexander testified during his first examination of Petitioner's left shoulder on September 13, 2012, he had the impression that the rotator cuff was torn and requested an MRI for confirmation (Pet. Ex. 6-4, p. 14-15). On cross examination, Dr. Alexander stated that due to his electronic medical note taking program, he did not have the capability of recording patient histories in a narrative fashion but believes that Petitioner gave the same history to him that he later gave to Dr. Davis (Pet. Ex. 6-6, p. 24-25). Dr. Alexander admitted that he did not have an independent recollection of the details of the history of the work accident given by Petitioner. Dr. Alexander testified he did not place restrictions on Petitioner since he was aware Respondent had on-site nurses, doctors and therapists who could assess the shoulder injury and prescribe appropriate light duty work (Pet. Ex. 6-10, p. 40, lines 1-6). Dr. Alexander agreed that surgical repair of the rotator cuff is reasonable and necessary and should be done as soon as possible work (Pet. Ex. 6-6, p. 21, lines 1-10).

On January 23, 2013, Dr. J.T. Davis, of the Orthopaedic Institute of Southern Illinois saw Petitioner on consultative referral from Dr. Alexander. Dr. Davis's detailed narrative history contains the work push/pull accident of August 4, 2012 and also recorded a history of temporary left shoulder pain experienced while moving a freezer. (Pet. Ex. 6-29, Ex. C to Dr. Alexander Dep.). Dr. Davis noted that the MRI does not show retraction of the torn rotator cuff, supporting Dr. Davis's opinion that the tear resulted from a recent acute injury, not chronic arthritis (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.). Dr. Davis recorded his strong opinion based on a reasonable degree of medical certainty that even if Petitioner had pre-existing rotator cuff tendonitis or bursitis, it was the push/pull work accident of August 4, 2012 that caused the rotator cuff tear (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.). Given that the full thickness tear will not repair or heal absent surgical intervention, Dr. Davis recommended a rotator cuff repair (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.). Dr. Davis placed pre-surgical restrictions for the left arm of no pushing or pulling, no lifting more than ten to fifteen pounds and no overhead activities (Pet. Ex. 6-30, Ex. C to Dr. Alexander Dep.).

Respondent submitted the narrative report of IME, Dr. George Paletta, Jr. dated April 1, 2013. Dr. Paletta reviewed the report of Dr. Davis, the medical records and deposition of Dr. Alexander, the MRI of January 18, 2013 and the medical records from Respondent's Health Service and Work Fit. Dr. Paletta took a history of the August 4, 2012 accident that was consistent in detail with the findings contained in the treating doctors' medical records. Dr. Paletta conducted a physical examination; significant findings included: left arm external rotation to 40 degrees with pain at the end range, pain on O'Brien's testing thumb up and thumb down, strength is limited by discomfort, and weakness on liftoff testing. (Resp. Ex. 1, p.4). Dr. Paletta's impression of the MRI was of a partial or full thickness tear of the rotator cuff left shoulder (Resp. Ex. 1, p.4). Dr. Paletta agreed that the presence of a full thickness rotator cuff tear would make the surgery suggested by Dr. Davis

reasonable and necessary (Resp. Ex. 1, p.3). Though Dr. Paletta could not state within a reasonable degree of medical certainty that the August 4, 2012 work accident caused the rotator cuff tear due to prior shoulder symptoms and treatment for arthritis; Dr. Paletta did not opine the August 4, 2012 work injury was not the cause of the rotator cuff tear nor did he offer any opinion within a reasonable degree of medical certainty as to the cause of the rotator cuff tear (Resp. Ex. 1, p.4).

Respondent called Steve Crane, Continental Tire Company's Worker's Compensation Director for North American Operations, who testified he manages the worker's compensation program covering over 75,000 Continental Tire employees. Mr. Crane testified that workers compensation claims are managed by a third party administrator. Mr Crane testified he was not aware of Petitioner having made a request to Respondent for an MRI of his left shoulder. On cross examination, Mr. Crane explained the Continental Tire plant in Mount Vernon has its own full time Health Service staffed by nurses and contract doctors and that the company uses a physical therapy provider, WorkFit, to treat Continental employees who have work injuries. Mr. Crane was shown the records of Continental Tire's Health Service and WorkFit concerning assessment and treatment of Petitioner's August 4, 2012 work injury. After reading the chart, Mr. Crane admitted that the Continental Tire Health Service Department records do reflect multiple references to Petitioner's Primary Care Doctor's request for an MRI. Mr. Crane testified he had not read the Continental Tire's Health Service records before testifying that Petitioner had made no request of Respondent for an MRI of his left shoulder. Mr. Crane explained his job duties do not include tracking the medical records of employees injured at work.

Based on the foregoing, the Arbitrator makes the following conclusions:

F. Is Petitioner's current condition of ill-being causally related to the injury?

The Arbitrator finds that Petitioner's current conditions of ill-being in the left shoulder are casually related to the undisputed August 4, 2012 accident where Petitioner injured his left shoulder when he pulled a loaded belt breaker cart.

K. Is Petitioner entitled to past and prospective medical care?

The Arbitrator finds that Respondent shall pay Petitioner for all past medical treatment related to Petitioner's condition of ill being in the amount of $2,657.45 as set forth in Petitioner's Exhibit 1; Respondent shall pay said charges subject to the fee schedule in the amounts provided for in Section 8.2 of the Act. The Arbitrator concludes that the above medical services were reasonable, necessary and related to the care of injuries sustained in accident of August 4, 2012. The Arbitrator finds that as a result of the work accident of August 4, 2012 Petitioner sustained a tear of his left rotator cuff and that surgical repair and post-surgical treatment is reasonable and necessary. Respondent shall pay the charges of medical treatment including surgical repair of Petitioner's left shoulder in amounts provided for in Section 8.2 of the Act.

L. Is Petitioner entitled to TTD?

The Arbitrator finds that Petitioner's treating doctor, JT Davis M.D., on January 23, 2013 placed medical restrictions on the use of Petitioner's left upper extremity which prevent him from returning employment. Respondent shall pay Petitioner TTD benefits commencing on January 23, 2013.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth Horton,

Petitioner,

vs.

No. 11WC016010

14IWCC0189

State of Illinois,
Department of Human Services,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, notice, medical expenses, and permanent disability, and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

FACTS

On August 25, 2010, Petitioner treated with Dr. John McClellan as a result of her primary care physician's recommendation. Petitioner complained of right shoulder, and bilateral wrist pain. Dr. McClellan noted that Petitioner's left wrist symptoms began gradually about three to four months prior and her right wrist symptoms began suddenly about nine months prior. Petitioner reported that she had bilateral wrist tingling and aching, and had pain rated seven out of ten and worsened with keyboard use. Petitioner also reported that she had prior medical treatment for her wrists which consisted of wearing wrist braces and taking non-steroidal anti-inflammatory medication. Petitioner's right wrist was more symptomatic than the left wrist. On examination, Petitioner was five feet and four inches tall and weighed 270 pounds. Petitioner's

left wrist examination was unremarkable with negative Phalen's and Tinel's tests. Petitioner's right wrist examination was generally unremarkable except for an equivocal Tinel's test. Dr. McClellan noted that Petitioner underwent electromyography studies on April 16, 2010, which showed mild median sensory and motor neuropathy on the right as well as C7 radiculopathy on the left. Dr. McClellan diagnosed Petitioner with bilateral carpal tunnel syndrome and right shoulder bicipital tendonitis, and recommended that Petitioner undergo a right wrist endoscopic carpal tunnel release, which he scheduled for November 19, 2010.

On October 1, 2010, Petitioner completed and signed a Workers' Compensation Employee's Notice of Injury form. The form states that Petitioner sustained injuries to "Both wrists, Right shoulder, [and] Left elbow," while performing "Regular caseworker duties, typing, [and] filing." Petitioner also indicated that "this is an ongoing problem, but has increasingly gotten worse."

On October 13, 2010, Dr. McClellan completed a request for reasonable accommodation form and recommended that Petitioner receive desk, chair and keyboard accommodations.

On October 21, 2010, Petitioner treated with her primary care physician, Dr. Wanda Hatter-Stewart, for a lap-band consult and completion of FMLA forms. Dr. Hatter-Stewart noted that Petitioner had a history of hypertension, gastric bypass surgery and obesity. On examination, Petitioner had "positive tinnels and phalens." Dr. Hatter-Stewart diagnosed Petitioner with "lateral epicondylitis of elbow," "carpal tunnel syndrome" and abnormal weight gain; and recommended that Petitioner follow up in three months.

On January 5, 2011, Petitioner returned to Dr. Hatter-Stewart and complained of bilateral wrist and hand pain as well as pressure in her head when she laughed. Petitioner also asked Dr. Hatter-Stewart to complete FMLA forms for carpal tunnel syndrome. On examination, Petitioner had "positive tinnels and phalens." Dr. Hatter-Stewart diagnosed Petitioner with abnormal weight gain, gastric lap band adjustment, sinus headache, cervical radiculopathy on the left, "lateral epicondylitis of elbow," and "carpal tunnel syndrome;" and recommended Petitioner return in one month.

On May 11, 2011, Petitioner returned to Dr. Hatter-Stewart who noted that Petitioner requested to be off work until she completed physical therapy. Dr. Hatter-Stewart also noted, "[Petitioner] states employer changed her to a position that requires more typing than the original position; this despite the letter from us asking typing [sic]. PT c/o the increase in typing is causing her more pain. Has appt. with ortho hand tomorrow and will be starting OT." Dr. Hatter-Stewart diagnosed Petitioner with "carpal tunnel syndrome," and recommended that she return in six weeks as well as follow up with her orthopedic physician and occupational therapist. Dr. Hatter-Stewart's progress notes dated October 21, 2010; January 5, 2011; and May 11, 2011; do not specify whether the diagnoses of "lateral epicondylitis of elbow" and "carpal tunnel syndrome" were in reference to a specific wrist or elbow.

On May 12, 2011, Petitioner returned to Dr. McClellan. Dr. McClellan noted that Respondent refused to authorize Petitioner's surgery and it had been postponed. Petitioner

reported that her bilateral wrist symptoms began about one to two years prior and continued to worsen. Petitioner's symptoms worsened with gripping and grasping activities, flexion and extension, keyboard use, lifting, sleeping and repetitious tasks. Her left wrist was more symptomatic than the right wrist. Petitioner's clinical examination was unchanged from the August 25, 2010, visit. Dr. McClellan recommended that Petitioner undergo repeat electromyography and nerve conduction studies (EMG/NCV studies).

On May 20, 2011, Petitioner underwent EMG/NCV studies of the left upper extremity, which produced normal results.

On June 14, 2011, Dr. Hatter-Stewart completed a medical review form in support of a reasonable accommodation request for Petitioner's upper extremity pain and paresthesias. Dr. Hatter-Stewart opined that Petitioner could not perform typing duties because of her disability and recommended that Petitioner receive dictation software, and accommodations to her desk and keyboard as typing aggravated Petitioner's carpal tunnel syndrome pain. Dr. Hatter-Stewart also indicated that Petitioner would be temporarily and totally disabled until June 20, 2011.

On July 27, 2011, Dr. McClellan reexamined Petitioner who reported that she worked 7.5 hours per day and typed at least 5.5 hours per day. Petitioner also reported that her bilateral wrist pain had decreased and she felt that "the function ha[d] returned to normal" in her left wrist and "the function [was] improving" in her right wrist. Petitioner estimated that her right wrist pain had improved 70 percent and her left wrist pain had improved 75 percent. Dr. McClellan recommended that Petitioner obtain a wrist rest and an ergonomic keyboard for her left wrist problems and undergo surgery for her right wrist. Dr. McClellan opined: "[w]e discussed her work environment and how she is typing for over 5.5 hours daily. Based [on] her 11 years with the State of Illinois and the amount of typing that she does, it is my medical opinion that the carpal tunnel syndrome was either caused by or exacerbated by her job."

On November 16, 2011, Dr. Michael Vender examined Petitioner at Respondent's request and generated a report. In his report, Dr. Vender noted that Petitioner developed symptoms in both upper extremities in April of 2009. On examination, Petitioner was five feet and four inches tall and weighed 300 pounds. Petitioner's range of motion in the right wrist was 70/60, compared to 70/70 on the left. Dr. Vender noted that he did not have Petitioner's EMG/NCV studies to review and recommended new EMG/NCV studies. Dr. Vender opined that Petitioner should undergo bilateral carpal tunnel releases assuming that the EMG/NCV studies supported Petitioner's diagnosis of bilateral carpal tunnel syndrome. Dr. Vender reviewed a "position description, demands of the job, and an ergonomic evaluation" that are not included in the record, and opined further:

> "Ms. Horton's job activities are that of an office-based and sedentary nature and would not be considered contributory to the development of possible carpal tunnel syndrome. Ms. Horton would be able to perform her normal work activities at this time. Ms. Horton's evaluation was remarkable for an increased body mass index which would represent a significant medical risk factor for the development of carpal tunnel syndrome."

On January 13, 2012, Dr. Vender generated an addendum to his November 17, 2011, section 12 examination report. Dr. Vender reviewed EMG/NCV studies dated April 16, 2010, and opined:

> "The results provided would be consistent with my impressions, at least on the right side. It does not correlate appropriately with my clinical impressions on the left side. I would consider performing [a] carpal tunnel release on the right. Before proceeding with surgery on the left or possibly even before proceeding with any surgery, I would consider repeat electrodiagnostic studies. This information does not change other comments noted in my report of November 17, 2011."

On February 8, 2012, Dr. McClellan generated a report in response to Dr. Vender's opinions, which states:

> "I would disagree with Dr. Vender and based upon the history that I have is that Elizabeth Horton types in her job capacity five and a half hours daily of the seven and a half hours that she works, and it is fairly well known that carpal tunnel can be derived from excessive typing so therefore I would not modify my opinion that the job that she presently has either caused or exacerbated carpal tunnel syndrome. At this point, I recommend a right endoscopic carpal tunnel release."

At his October 26, 2012, deposition, Dr. McClellan testified that he is a board certified orthopedic surgeon. Prior to treating Petitioner for bilateral wrist complaints, Dr. McClellan treated Petitioner for unrelated orthopedic problems. When asked how he formed his opinion that Petitioner's job either caused or exacerbated her bilateral wrist symptoms, Dr. McClellan stated that "typing is one of the occupations that causes carpal tunnel syndrome" and agreed that typing for five and a half hours per day for five days per week for about eleven years could cause carpal tunnel syndrome. On cross examination, Dr. McClellan acknowledged that less than 5 percent of the 20 percent of hand conditions that he treats in his practice are carpal tunnel syndrome injuries. Dr. McClellan also acknowledged that he relied on Petitioner's description of her injuries in forming his opinions and he did not review a job description. Dr. McClellan opined that morbid obesity does not cause carpal tunnel syndrome as he had never read that weight loss was a treatment for carpal tunnel syndrome and "[y]ou can't say that morbid obesity causes carpal tunnel syndrome because there are people who are morbidly obese who do not have carpal tunnel syndrome."

At his December 14, 2012, deposition, Dr. Vender testified that he is a board certified orthopedic surgeon, specializing in hand surgery. The most common condition that Dr. Vender treats is carpal tunnel syndrome and trigger finger injuries. Dr. Vender opined that while most cases of carpal tunnel syndrome are idiopathic, there are some risk factors for developing the condition such as forceful activities performed on a regular and persistent basis, age, gender and obesity. Dr. Vender also opined that Petitioner's job, although "repetitive in the sense that there are different activities she does, some of which will involve repetitiveness," was not forceful. Petitioner's body mass index, which was over 40, put her at an increased risk for developing

carpal tunnel syndrome. In forming his opinions, Dr. Vender referenced some medical studies which produced results indicating that there is a lack of a causal relationship between carpal tunnel syndrome and typing. On cross-examination, Dr. Vender acknowledged that he did not know how many hours Petitioner typed each day.

At the March 27, 2013, arbitration hearing, Petitioner testified that she has worked as a caseworker for Respondent for approximately 13 years. Petitioner's job duties consisted of typing, data entry and interviewing clients. Prior to August of 2010, Petitioner's work station included a desk, a chair, a computer and a standard keyboard. Following Petitioner's August 25, 2010, appointment with Dr. McClellan, Petitioner returned to full duty work and reported her bilateral carpal tunnel syndrome diagnosis to her supervisor. Petitioner continued working and did not undergo the right carpal tunnel release that Dr. McClellan recommended because she could not afford to take time off work. Subsequently, Petitioner began occupational therapy at Dr. Hatter-Stewart's recommendation. Respondent did not accommodate the work restrictions that Dr. Hatter-Stewart placed on July 7, 2011. Petitioner missed work from May 11, 2011, through October 28, 2011, due to her bilateral wrist pain.

Petitioner testified that she sits in front of a computer for 7.5 hours per day and that she types for 5.5 hours per day. Although Petitioner is right-handed, she uses both hands to type. Petitioner stated that she performs "the exact same job as [she] did prior to the work injury." Petitioner continues to experience bilateral wrist pain that radiates into her shoulders as well as tingling in her fingertips, and she wears wrist braces at work which were recommended by a doctor. Petitioner has not undergone the right carpal tunnel release that Dr. McClellan continued to recommend because she "felt like [she] was going to have problems if [she] tried to go back to work [after the surgery]" and she "figured it was better for [her] to just try to go back to work and work with the situation they gave [her]."

On cross-examination, Petitioner clarified her work duties prior to the time that she stopped performing client interviews. Petitioner testified that she worked from 8 a.m. to 4 p.m. or from 8 a.m. to 4:30 p.m., and she either took a 30 or 60 minute lunch break in addition to two 15 minute breaks and some unscheduled restroom breaks. A client interview consisted of asking demographic questions and entering the information into a computer during the interview. Petitioner used a mouse to click on different computer screens while entering data. Occasionally, Petitioner filed case records, which weighed about five to ten pounds, and also walked to a printer located 20 feet from her desk several times a day. Petitioner also read and responded to emails, and answered the telephone periodically.

Further, Petitioner acknowledged that she reported her hand and wrist symptoms to a supervisor prior to completing an injury report on October 1, 2010. When Petitioner returned to work in October of 2011, Respondent approved her request for accommodations and gave her a stand for papers, a telephone headset and an adjustable keyboard tray. Petitioner also acknowledged that although her job title has never changed, she no longer interviews clients and types more than she did in the past. Petitioner is able to perform her full work duties. On redirect examination, Petitioner testified that she received her workstation modifications in late October of 2011.

Ms. Barbara Pittman, a case manager for the Department of Human Services and Petitioner's supervisor, testified on Respondent's behalf. Ms. Pittman testified that she managed six other caseworkers in addition to Petitioner. In August of 2010, caseworkers interviewed and assisted clients as the clients completed a paper application. Afterward, the caseworker would "process" the application by entering the application information into a computer. Caseworkers were not required to type during the interview. On average, caseworkers processed applications for two to three hours per day and typed for about one to two hours per day. Ms. Pittman performs the same job duties that a caseworker performs and can see the caseworkers that she manages from her cubicle. In addition, Ms. Pittman walks around the office periodically to observe the caseworkers. Caseworkers are required to complete a log of how much work they complete each day and there has never been a time when a caseworker would type for five and a half hours in one day. Since August of 2010, Petitioner's job duties have changed and she no longer conducts client interviews, which has resulted in increased typing duties. Currently, Petitioner performs about five to six hours of intermittent typing per workday. Ms. Pittman testified that Petitioner's work productivity was "great." On cross-examination, Ms. Pittman testified that interviews lasted anywhere from 15 to 30 minutes, and none of the caseworkers typed while interviewing clients, including Petitioner. During an interview, caseworkers were only required to help clients complete paper applications.

DISCUSSION

The Arbitrator found Petitioner proved that she sustained compensable repetitive trauma injuries to her hands which manifested on August 25, 2010. The Commission disagrees.

The Commission finds Petitioner failed to prove that she sustained work-related repetitive trauma injuries as Dr. McClellan's opinions are not credible or persuasive. On August 25, 2010, Dr. McClellan noted that Petitioner had an unremarkable left wrist examination, an equivocal Tinel's test on the right and EMG results that showed mild median sensory and motor neuropathy on the right as well as C7 radiculopathy on the left. Dr. McClellan diagnosed Petitioner with bilateral carpal tunnel syndrome despite having no objective support for the left wrist diagnosis. The Commission finds Dr. McClellan's opinion that morbid obesity does not cause carpal tunnel syndrome because he has never read that weight loss was a treatment for carpal tunnel syndrome and because "there are people who are morbidly obese who do not have carpal tunnel syndrome," is unpersuasive. Dr. Vender's opinion that Petitioner's carpal tunnel syndrome was not causally related to her work duties is more persuasive based on his medical qualifications and knowledge of the risk factors associated with the development of carpal tunnel syndrome.

Lastly, the Commission finds that Petitioner's testimony was inconsistent with the evidence. Petitioner testified that she currently sits in front of a computer for 7.5 hours per day and types for 5.5 hours per day. Petitioner also testified that she performs "the exact same job as [she] did prior to the work injury." On cross-examination, Petitioner acknowledged that she currently types more than she did in the past. The Commission notes that on May 11, 2011, Dr. Hatter-Stewart indicated that Petitioner's employer "changed her to a position that requires more typing than the original position." Contrary to Petitioner's testimony on direct examination, the

evidence shows that around May 11, 2011, her job duties changed and she began to type more. Petitioner testified that she currently types 5.5 hours per day but did not testify as to how often she typed prior to the change in her job duties. The Commission also notes that in forming his opinions, Dr. McClellan relied on the fact that Petitioner typed for 5.5 hours per day for about eleven years.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on April 18, 2013, is hereby reversed.

No bond is required for removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 18 2014
MPL/db
o-01/22/14
352

Michael P. Latz

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

HORTON, ELIZABETH
Employee/Petitioner

Case# **11WC016010**

STATE OF ILLINOIS
Employer/Respondent

14IWCC0189

On 4/18/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

4681 MARTAY LAW OFFICES
STEPHEN R MARTAY
134 N LASALLE ST 9TH FL
CHICAGO, IL 60602

5132 ASSISTANT ATTORNEY GENERAL
STACEY R LASKIN
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 ST EMPLOYMENT RETIREMENT SYSTEMS
2101 S VETERANS PARKWAY*
PO BOX 19255
SPRINGFIELD, IL 62794-9255

CERTIFIED as a true and correct copy pursuant to 820 ILCS 305/14

APR 18 2013

KIMBERLY B. JANAS Secretary
Illinois Workers' Compensation Commission

☐	Injured Workers' Benefit Fund (§4(d))
☐	Rate Adjustment Fund (§8(g)
☐	Second Injury Fund (§8(e)18)
☒	None of the above

STATE OF ILLINOIS)
)
COUNTY OF COOK)

14IWCC0189

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION

ELIZABETH HORTON
Employee/Petitioner

Case #11 WC 16010

v.

STATE OF ILLINOIS
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on March 27, 2013. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

ISSUES:

A. ☐ Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. ☐ Was there an employee-employer relationship?

C. ☒ Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☒ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

L. ☒ What is the nature and extent of injury?

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

FINDINGS

- On August 25, 2010, the respondent was operating under and subject to the provisions of the Act.

- On this date, an employee-employer relationship existed between the petitioner and respondent.

- In the year preceding the injury, the petitioner earned $54,912.00; the average weekly wage was $1,056.00.

- At the time of injury, the petitioner was 41 years of age, *single* with no children under 18.

ORDER:

- The respondent shall pay the petitioner temporary total disability benefits of $704.00/week for one week, from June 14 through 20, 2011, which is the period of temporary total disability for which compensation is payable.

- The respondent shall pay the petitioner the sum of $633.60/week for a further period of 20.5 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 6% loss of use of her right hand and 4% loss of use of her left hand.

- The respondent shall pay the petitioner compensation that has accrued from August 25, 2010, through March 27, 2013, and shall pay the remainder of the award, if any, in weekly payments.

- The medical care rendered the petitioner for her right carpal tunnel syndrome and left wrist/hand pain was reasonable and necessary. The respondent shall pay the medical bills in accordance with the Act and the medical fee schedule. The respondent shall be given credit for any amount it paid toward the medical bills, including any amount paid within the provisions of Section 8(j) of the Act, and any adjustments, and shall hold the petitioner harmless for all the medical bills paid by its group health insurance carrier.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Robert E. O'Dean

Robert Williams

4/18/13

Date

APR 18 2013

FINDINGS OF FACTS:

The petitioner, a caseworker for nine years, was examined by Dr. John McClellan of Bone & Joint Physicians on August 25, 2010, for right shoulder symptoms that began gradually 4-5 weeks earlier, left wrist symptoms that began gradually 3-4 months earlier and right wrist symptoms that began suddenly nine months earlier and on January 20, 2010. She reported that her wrists symptoms increased with keyboard use and typing. The doctor noted that an EMG report indicated mild median sensory and motor neuropathy on the right and recommended a right carpal tunnel release. His diagnosis was right shoulder bicipital tendinitis and bilateral carpal tunnel syndrome.

The petitioner saw her primary care physician, Dr. Wanda Hatter Stewart, of Family Christian Health Center on October 21, 2010. The doctor's diagnosis was carpal tunnel syndrome and lateral epicondylitis of elbow. She saw Dr. Bridgette Arnett of South Suburban Neurology on November 18, 2010, for vertigo and dizziness that started four to five months earlier. The petitioner followed up with Dr. Stewart on January 5, 2011, and reported continuing bilateral hand/wrist pain. On April 27, 2011, Dr. Stewart noted that the petitioner's chief complaints were right arm, neck and shoulder pain and left hand, arm and shoulder pain. The petitioner's chief complaint on May 11, 2011, to Dr. Stewart was carpal tunnel.

On May 12, 2011, the petitioner returned to Dr. McClellan with right wrist and left wrist/hand pain. An EMG of her left upper extremity on May 20, 2011, was normal. On June 14, 2011, Dr. Stewart prepared a "Request for Reasonable Accommodation" and an "Authorization for Disability Leave and Return to Work" for the petitioner through June 20, 2011. The accommodations requested were dictation software, desk and

keyboard. She had a gastric band adjustment on July 6, 2011. Dr. McClellan saw the petitioner on July 27, 2011, and reiterated his diagnosis of bilateral carpal tunnel syndrome. He recommended an ergonomic keyboard and wrist rests for the petitioner. The petitioner saw Dr. Stewart on August 10, 2011, for abdomen pain and on September 6, 2011, for left hip and thigh pain.

At the request of the respondent, Dr. Michael Vender evaluated the petitioner on November 16, 2011, and opined the petitioner's work activities were sedentary and are not considered contributory to the development of carpal tunnel syndrome. On February 8, 2012, Dr. McClellan opined that carpal tunnel can be derived from excessive typing and that her job caused or exacerbated her carpal tunnel syndrome.

FINDING REGARDING THE DATE OF ACCIDENT AND WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH THE RESPONDENT:

Based upon the testimony and the evidence submitted, the petitioner proved that she sustained an accident on August 25, 2010, arising out of and in the course of her employment with the respondent.

The weight of Dr. McClellan's opinion is undermined by his lack of knowledge of the major contributing causes of carpal tunnel syndrome. Moreover, the doctor's deduction that morbid obesity cannot be proven as a cause of carpal tunnel syndrome since it is not a ubiquitous condition with obesity also would negate prolonged typing as a causative factor. However, Commission decisions and case law has established the precedent of a causal relationship of carpal tunnel syndrome with the prolonged repetition and hands positioning required with typing documents. Although Dr. Vender indicated that he based his opinion on various medical studies, without a more substantial

evidentiary basis, it is not sufficient to counter the precedents set by case law of a causal relationship of carpal tunnel syndrome with prolonged typing.

FINDINGS REGARDING WHETHER TIMELY NOTICE WAS GIVEN TO THE RESPONDENT:

The petitioner provided the respondent with an executed "Workers' Compensation Employee's Notice of Injury" on October 1, 2010. The respondent received timely notice of the petitioner's injury.

FINDING REGARDING WHETHER THE MEDICAL SERVICES PROVIDED TO THE PETITIONER ARE REASONABLE AND NECESSARY:

The medical care rendered the petitioner for her right carpal tunnel syndrome and left wrist/hand pain was reasonable and necessary.

FINDING REGARDING WHETHER THE PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY:

Based upon the testimony and the evidence submitted, the petitioner proved that her current condition of ill-being with her right carpal tunnel syndrome and her left wrist/hand pain is causally related to the work injury.

FINDING REGARDING THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY:

Based on the medical evidence, the petitioner was off of work due to her work injury and pursuant to her doctor's recommendation from June 14th through the 20th, 2011. Other than Petitioner's Exhibit #4, there is no other medical evidence that the petitioner's doctor provided her with a written authorization to stop working or to limit her work activities. Nor was there sufficient evidence that the respondent was notified of the off-work or work limitation authorization.

The respondent shall pay the petitioner temporary total disability benefits of $704.00/week for one week, from June 14 through 20, 2011, as provided in Section 8(b) of the Act, because the injuries sustained caused the disabling condition of the petitioner.

FINDING REGARDING THE NATURE AND EXTENT OF INJURY:

The petitioner complains of tingling in her fingers and bilateral wrist pain up to her shoulders. She wears wrist splints and takes ibuprofen.

The respondent shall pay the petitioner the sum of $633.60/week for a further period of 20.5 weeks, as provided in Section 8(e) of the Act, because the injuries sustained caused the permanent partial disability to petitioner to the extent of 6% loss of use of her right hand and 4% loss of use of her left hand.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☒ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Aimee Duluski,

Petitioner,

vs. No. 10WC028861

14IWCC0190

Tazewell County,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issue of accident and being advised of the facts and law, reverses the decision of the Arbitrator for the reasons stated below.

FACTS

Pre-accident medical records show that on December 29, 2009, Petitioner treated with Dr. Jill Wirth, her family doctor. Dr. Wirth noted that Petitioner's chief complaint was "joint pain in knees and elbows more so it [sic] elbow." Dr. Wirth also noted that Petitioner's joint pains began a few months prior after participating in a "body pump class" and her pain worsened after participating in the "Jingle Bell run" in early December. Petitioner reported that her knees swelled occasionally and her right knee was more bothersome than her left knee. Petitioner also reported having increased fatigue and stated that although she had visited Wisconsin recently, she did not remember having tick bites. On examination, Petitioner had upper and lower extremity joint pain, some tenderness in the medial joint line and proximal insertion of the medial collateral ligament in the right knee, and no joint line tenderness in the left knee. Dr. Wirth diagnosed Petitioner with pain in multiple joints, and recommended that Petitioner undergo various blood tests such as Lyme disease, rheumatoid factor and thyroid tests.

On January 18, 2010, Petitioner treated with Dr. Brad Roberts, a doctor of osteopathic medicine. Dr. Roberts noted that Petitioner had a right knee MRI which showed a mildly complex non-displaced tear of the posterior horn of the medial meniscus, diagnosed Petitioner with a medial meniscal tear and performed a right knee injection.

On March 1, 2010, Petitioner returned to Dr. Roberts and reported that her right knee was better except for some instability. Petitioner also reported that she wished to avoid surgery and wanted to undergo physical therapy. Dr. Roberts recommended that Petitioner undergo physical therapy as requested and noted that she could return as needed. That day, Petitioner underwent her first physical therapy session and reported having continued intermittent right anteromedial knee pain, but had no pain that day. The physical therapist noted that Petitioner had very little impairment and conservative treatment was appropriate.

On May 25, 2010, Petitioner sought treatment with Dr. Wirth who noted, "[p]atient here for Lt knee pain hurt yesterday bending down to pick chart [sic]." Dr. Wirth also noted, "[y]esterday, she squatted down and she felt some pain in the left knee on the medial aspect." Petitioner reported that she could not straighten her left knee, experienced significant pain with walking and climbing stairs, and her left knee felt as if it were "locked." Dr. Wirth noted Petitioner had no known previous injury. On examination, Petitioner had an antalgic gait along with left knee medial joint line tenderness and minimal swelling. Dr. Wirth diagnosed Petitioner with left knee pain, noted that Petitioner had a possible medial meniscus injury, recommended an MRI and performed a left knee injection.

On June 7, 2010, Petitioner treated with Dr. Brent Johnson, an orthopedic surgeon, at Dr. Wirth's recommendation. Dr. Johnson noted: "[Petitioner] reports she injured [her left knee] 2 weeks ago while at work on May 24, 2010. She reports she was bending down to lift up a file out of her cabinet and felt a pop in her knee. She reports she felt a ripping sensation on the inside part of her knee and since then has been having pain on the medial aspect." Petitioner also reported having constant throbbing-type pain in the left knee and associated swelling. On examination of the left knee, Petitioner had "a small effusion," medial joint line tenderness and a positive McMurray's test. Dr. Johnson noted that Petitioner's left knee MRI showed a large, flap-type tear in the posterior horn of the medial meniscus. Dr. Johnson diagnosed Petitioner with a medial meniscus tear, and recommended that Petitioner undergo a left knee arthroscopy and partial meniscectomy based on her significant pain and mechanical symptoms.

On June 22, 2010, Dr. Johnson performed a left knee arthroscopy and partial medial meniscectomy. In his report of operation, Dr. Johnson noted that Petitioner had a radial tear in the posterior horn of the medial meniscus with a loose meniscal flap.

On October 13, 2010, Petitioner returned to Dr. Johnson and reported having some mild aching in the left knee with no significant pain or swelling. Petitioner also reported that she was able to walk three to four miles per day up to four times per week. On examination, Petitioner's left knee was non-tender with palpation and she had full range of motion. Dr. Johnson opined that Petitioner had reached maximum medical improvement, and recommended that Petitioner perform activities as tolerated and return on an as needed basis.

At his January 31, 2011, deposition, Dr. Johnson opined that the May 24, 2010, accident caused Petitioner's torn meniscus. Dr. Johnson also opined that Petitioner is at a "slight increased risk" of developing osteoarthritis in the left knee as a result of the surgery she underwent. Dr. Johnson did not expect Petitioner to have further swelling or pain in the left knee; however, continued pain after surgery could occur. On cross-examination, Dr. Johnson testified that Petitioner had not returned for treatment since October 13, 2010. Dr. Johnson acknowledged that a person could sustain a meniscus tear if he or she were bending down or twisting their knee and "reaching down to pick something up off the floor, even if they were not at work." However, Dr. Johnson also acknowledged that it would be uncommon for a person of Petitioner's age to develop a meniscus tear from day-to-day activities, and people who run are not more prone to developing meniscus injuries.

On May 4, 2011, Petitioner returned to Dr. Johnson and reported that she was doing "much, much better." Petitioner was able to participate in the body pump exercise class without pain or difficulty. Dr. Johnson noted that Petitioner's Plica syndrome had resolved, opined that Petitioner had reached maximum medical improvement, and recommended that Petitioner continue with activities as tolerated and follow up as needed.

On July 26, 2011, Dr. Richard Lehman, an orthopedic surgeon, performed a section 12 examination of Petitioner at Respondent's request. Dr. Lehman noted that Petitioner reported sustaining a left knee injury on May 24, 2010, when she "was picking up a very large file, bent over to pull up and felt that her left knee ripped apart." Dr. Lehman reviewed Petitioner's left knee MRI and opined that it showed a "nondisplaced oblique horizontal cleavage tear through the posterior horn and apex of the medial meniscus," which was noted to be degenerative in nature. Dr. Lehman opined that horizontal cleavage tears are degenerative in nature. Further, Dr. Lehman noted that in January of 2010, Petitioner underwent a right knee MRI that showed a mildly complex non-displaced tear of the posterior horn of the medial meniscus, and stated that "[t]his would be a similar meniscal pathology to the meniscal tear eventually identified into her left knee." Lastly, Dr. Lehman opined:

> "I do not believe that her current problems were caused by her work related injury. I do not believe she will have impairment in the future, nor does she have impairment now from this incident. I believe that this patient's meniscus tear is preexisting for a number of reasons, the most being that she had a traumatic injury to her knee by her history and had absolutely no swelling in her knee the day after her injury. I also believe that the patient had a horizontal cleavage tear which was characterized as degenerative on the patient's MRI but horizontal cleavage tears and the type of tear that was identified, a large severe tear of the meniscus, if were acute would have caused bleeding and without question would have had some swelling in the joint and some severity of inflammation in the joint and this was not identified. Furthermore, the patient had a similar pathological process in the right knee which is consistent with the same degenerative process in the knee.
>
> Based on these findings it would be very difficult to state that she had an acute pathological process to her knee. The only way that this could be identified

would be if she were to have swelling or bone marrow edema or some acute findings on her MRI, given the size and severity of the tear and noted in the MRI is the degenerative nature of the tear [sic]."

At his March 13, 2012, deposition, Dr. Lehman reiterated the opinions found in his July 26, 2011, section 12 report. On cross-examination, Dr. Lehman acknowledged that he did not know whether Petitioner lifted the file from the floor, from a desk or from a file cabinet at the time of her injury. Dr. Lehman agreed that a tearing or ripping sensation in the knee is consistent with an injury; however, Dr. Lehman opined that Petitioner did not further injure her preexisting degenerative left knee condition on May 24, 2010.

At the July 25, 2012, arbitration hearing, Petitioner testified that she works as a public defender about three to four days per week, and also works as a part-time guardian ad litem for Respondent. In addition, Petitioner has a private business working with the Department of Children and Family Services periodically. Petitioner is required to maintain her own office space while working for Respondent.

Petitioner testified that on May 24, 2010, while in the process of preparing to meet with a public defender client, she bent down to pick up a large file from the bottom drawer of a file cabinet. Petitioner stated: "when I bent down to pull it I bent and yanked it and my knee just - - it just ripped and popped open." Petitioner screamed and felt an immediate burning sensation at the time of the injury. She told her colleague's secretary that she hurt her knee and asked her to bring the client upstairs as she could not walk down the stairs. Petitioner testified that the file she lifted was a seven to eight inch thick legal file. At the request of her attorney, Petitioner demonstrated how she injured her left knee and the following dialogue occurred:

"THE WITNESS: The file cabinet goes like this. It's one of those old ones where you open it, you pull it down, and then I bent down like this actually, a squat.

THE ARBITRATOR: Squatted?
THE WITNESS: Yeah, and I was pulling like this and as I pulled it, it just ripped up. It just - -

THE ARBITRATOR: Did you pull it out?
THE WITNESS: The file?

THE ARBITRATOR: Yeah.
THE WITNESS: Yeah, it was while I was pulling it; pulling it out.

THE ARBITRATOR: Pulling it out?
THE WITNESS: Yeah, and I did get the file out because I had her come again, but - -

THE ARBITRATOR: So you felt it when you were in a squatted down position pulling it out?

THE WITNESS: Yeah, kind of like in a frog position. I know that sounds weird, but just kind of - -

QUESTIONS BY [PETITIONER'S ATTORNEY]:

Q. Being a baseball fan I described it as a catcher's squat. That's the kind of situation you were in. However, you described how your knee felt. Did you have any problems with it? Did it swell up? Did you have any other issues with it as the day went on after you had the problem and were seeing the client?

A. Oh yeah, it hurt. It got worse and worse and then I made it home and I told my husband I think I really did something to my knee. And the next morning I could not - - I could barely walk. I could not walk my child into school and I did drop off so I got into the doctor [sic]."

Petitioner noted that the right knee pain she felt in December of 2009 began gradually after running a race, and was unlike the pain she felt in her left knee on the day of the accident.

Currently, Petitioner does not water or snow ski as she used to and no longer runs or participates in her body pump class, which is an exercise routine with weights. Instead, Petitioner participates in a spin class. Petitioner also wears different shoes for work and has to "watch [] the incline of [her] shoes." Petitioner's left knee aches at the end of the day and she ices it and takes Ibuprofen for her pain.

Ms. Terry Ales, the legal secretary employed by Petitioner's colleague, testified on Petitioner's behalf. Ms. Ales testified that although she does "some courtesy things" for Petitioner like seating clients when Petitioner is in court, she does not work for Petitioner. On May 24, 2010, Ms. Ales heard Petitioner scream out in pain. Ms. Ales turned around when she heard Petitioner scream and saw her attempt to walk out of her office. Petitioner told Ms. Ales that she hurt her knee and asked Ms. Ales to bring the client upstairs because Petitioner could not walk down the stairs. On cross-examination, Ms. Ales acknowledged that she did not see Petitioner injure her knee.

DISCUSSION

The Arbitrator found Petitioner failed to prove that she sustained an accident arising out of and in the course of her employment with Respondent on May 24, 2010. The Arbitrator reasoned that "the credible evidence supports a finding that the 'rip and tear' of petitioner's left knee occurred as she was simply bending down to retrieve a file from the filing cabinet" and "petitioner had not twisted or torqued her left knee as she squatted and had not yet reached for or pulled the case file until after she felt the rip and tear in her knee." Given her findings, the Arbitrator concluded Petitioner was not exposed to a risk of injury greater than that to which the general public is exposed. The Commission disagrees.

The Commission finds Petitioner credibly testified that she felt a ripping and popping sensation in her left knee as she yanked and pulled a large, seven to eight inch thick file out of the bottom drawer of a file cabinet while squatting. Contrary to the Arbitrator's findings, Petitioner specifically stated that she was squatting down in a "frog position" and she felt a ripping sensation while she pulled the file out of the cabinet. The Commission finds that having to lift large case files as thick as seven to eight inches from the bottom drawer of a file cabinet is an activity that exposed Petitioner to a risk of injury greater than that to which the general public is exposed.

The Commission also finds that Petitioner's description of the mechanism of injury is consistent with the histories contained in the medical records, and any differences between the two constitute semantic differences and a lack of detail. Dr. Wirth's May 25, 2010, progress note states that Petitioner "hurt [her left knee] yesterday bending down to pick chart [sic]" and "she squatted down and she felt some pain in the left knee on the medial aspect." The description contained in Dr. Wirth's note is accurate although it does not contain all of the details Petitioner provided at the arbitration hearing. Dr. Johnson's June 7, 2010, note states that on the day of accident, Petitioner was "bending down to lift up a file out of her cabinet and felt a pop in her knee" as well as "a ripping sensation on the inside part of her knee." The description contained in Dr. Johnson's note is also accurate even though it does not precisely state all of the details contained in Petitioner's testimony. Finally, Dr. Lehman's section 12 report states that Petitioner "was picking up a very large file, bent over to pull up and felt that her left knee ripped apart." The description in Dr. Lehman's report, although imprecise and lacking in detail, does not contradict Petitioner's testimony.

In regards to causation, the Commission finds that Dr. Johnson's opinions are more credible and persuasive than Dr. Lehman's opinions. At his deposition, Dr. Johnson opined that the May 24, 2010, accident caused Petitioner's torn meniscus and it would be uncommon for a person of Petitioner's age to develop a meniscus tear from day-to-day activities. Dr. Lehman's opinion that Petitioner's left knee medial meniscus tear is degenerative in nature and is not causally related to the May 24, 2010, accident is not credible. Dr. Lehman believed that Petitioner's left knee meniscus tear was preexistent because "[Petitioner] had a traumatic injury to her knee by her history and *had absolutely no swelling in her knee the day after her injury*." (Emphasis added). Dr. Lehman also opined that the only way he could state that Petitioner's medial meniscus tear was acute is if she had swelling, bone marrow edema or some acute findings on her MRI. The Commission points out that Dr. Wirth's progress note from the day after the accident shows that Petitioner had some swelling on examination. Dr. Johnson's June 7, 2010, progress note states that Petitioner complained of left knee pain and swelling, and Petitioner had "a small effusion" on examination. The Commission finds Petitioner proved that her left knee condition is causally related to the May 24, 2010, work accident based on a chain of causation analysis and Dr. Johnson's opinions. The Commission awards Petitioner all reasonable and necessary medical expenses related to her left knee condition in the amount of $1,013.96.

With respect to the nature and extent of Petitioner's injuries, the Commission finds that her injuries caused the loss of use of 15 percent of the left leg. The Commission notes Dr.

Johnson opined that although he did not expect Petitioner to have further swelling or pain in the left knee, it could occur. Additionally, Dr. Johnson opined that Petitioner is at a "slight increased risk" of developing osteoarthritis in the left knee as a result of the surgery she underwent. Petitioner testified that her left knee aches at the end of the day, and she ices it and takes Ibuprofen for her pain.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed on August 16, 2012, is hereby reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner all reasonable and necessary medical expenses related to her left knee condition in the amount of $1,013.96 under §8(a) and §8.2 of the Act subject to the medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $424.20 per week for a period of 32.25 weeks, as provided in §8(e) of the Act, for the reason that the injury sustained caused permanent partial disability equivalent to 15% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner interest under §19(n) of the Act, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $14,800.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: MAR 18 2014
MJB/db
o-01/28/14
52

Michael J. Brennan

Charles J. DeVriendt

Ruth W. White

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DULUSKI, AIMEE
Employee/Petitioner

Case# **10WC028861**

14IWCC0190

TAZEWELL COUNTY
Employer/Respondent

On 8/16/2012, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.14% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

BROWN & GLANCY LLC
JOEL E BROWN
416 MAIN ST SUITE 1300
PEORIA, IL 61602

1337 KNELL & KELLY LLC
STEPHEN P KELLY
504 FAYETTE ST
PEORIA, IL 61603

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

☐ Injured Workers' Benefit Fund (§4(d))
☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

AIMEE DLUSKI,
Employee/Petitioner

v.

TAZEWELL COUNTY,
Employer/Respondent

Case # 10 WC 28861

Consolidated cases: _____

14IWCC0190

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Maureen Pulia**, Arbitrator of the Commission, in the city of **Peoria**, on **7/25/12**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On **5/24/10**, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did* exist between Petitioner and Respondent.

On this date, Petitioner ***did not*** sustain an accident that arose out of and in the course of employment.

Timely notice of this accident *was* given to Respondent.

In the year preceding the injury, Petitioner earned **$36,764.00**; the average weekly wage was **$707.00**.

On the date of accident, Petitioner was **36** years of age, ***married*** with **3** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$00.00** for TTD, **$00.00** for TPD, **$00.00** for maintenance, and **$00.00** for other benefits, for a total credit of **$00.00**.

Respondent is entitled to a credit of **$00.00** under Section 8(j) of the Act.

ORDER

The petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10. The petitioner's claim for compensation is denied.

RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

8/13/12
Date

AUG 16 2012

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 36 year old public defender, alleges she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10. Petitioner works for the County of Tazewell. She is required to maintain her own office space. Petitioner shares a loft with another attorney. Petitioner has 450 clients and keeps all their files in a filing cabinet. Petitioner initially testified that when she bent down to get a file out of the bottom filing cabinet she felt her knee rip and pop. The file she was going to retrieve was a legal size file about 7-8 inches deep. Upon further direct testimony Petitioner provided a slightly different accident history. She testified that she squatted down and was pulling the file out of the filing cabinet when she felt the pain in her left knee. She testified that she felt pain in the squat position and in the process of pulling out the file.

Prior to 5/24/10, in December of 2009 petitioner presented to Dr. Wirth, her primary care physician. She complained of joint pain in her knees and elbows, more so in the elbows that started 3 months ago while doing a body pump class. She said she started having pain in the elbows that worsened after running the Jingle Bell run in early December. She reported that her knees swelled occasionally, and her right knee was the most bothersome on the medial aspect. She denied any injury to her joints. She stated the pain was mostly in her elbows and knees and alternates as to which is the most painful. She reported that her right knee bothered her when going up and down stairs and getting in and out of the car. She said holding weights bothered her elbows, and she was unable to lift her children without discomfort. Following an examination she was assessed with joint pain of multiple joints. Dr. Wirth was suspicious of a systemic cause due to multiple joint involvement. Blood work was ordered.

On 1/18/10 petitioner presented to Midwest Orthopedic by Dr. Brad Roberts. Petitioner believed her right knee pain had been ongoing for a couple of months, and she had an exacerbation on 12/5/09. She reported increased pain going up and down stairs. She also complained of pain in her left elbow. Petitioner had been treated for presumptive lateral epicondylitis involving the left elbow and potential meniscal injury in the right knee. An MRI of the right knee revealed a mildly complex nondisplaced tear of the posterior horn of the medial meniscus. Also noted was focal marrow edema within the medial femoral condyle suggestive of a bone contusion. Additionally, there was mild cartilage thinning within the patellofemoral compartment. Petitioner was examined and an injection was performed. She was given home exercises.

On 3/1/10 petitioner was still feeling some instability in her right knee. Following an examination Dr. Roberts prescribed a formal physical therapy. Petitioner was released from care for her right knee.

On 5/25/10 petitioner presented to Dr. Wirth. She complained of left knee pain. It was noted "patient here for Lt knee pain hurt yesterday bending down to pick chart." Petitioner gave a history of squatting down and feeling some pain in the left knee of the medical aspect. She complained that she could not straighten her knee and felt like it was locked. She reported pain with walking, and stated that stairs are very painful. She also reported pain getting in and out of the car. She denied any previous injury. Following an examination Dr. Wirth assessed left knee pain. She suspected that petitioner may have a medial meniscus injury. Dr. Wirth injected petitioner's left knee and ordered an MRI.

On 6/7/10 petitioner presented to Dr. Brent Johnson at the request of Dr. Wirth. She reported that she was bending down to lift up a file out her cabinet and felt a pop in her knee. She reported that she felt a ripping sensation on the inside part of her knee and since then has been having pain on the medial aspect. She described a constant throbbing type pain. She reported associated swelling, as well as pain. She reported that it has not significantly improved or worsened over time. She reported that it is exacerbated with standing, walking, exercising, bending, squatting, kneeling and stairs. Following an examination and review of the MRI, Dr. Johnson assessed a medial meniscus tear. Dr. Johnson recommended a left knee arthroscopy and partial meniscectomy.

On 6/22/10 petitioner underwent a left knee arthroscopy and partial medical meniscectomy. This procedure was performed by Dr. Brent Johnson. Petitioner followed up postoperatively with Dr. Johnson. This treatment included a course of physical therapy.

On 7/24/10 petitioner's Application for Adjustment of Claim was filed. The date of accident was identified as 5/24/10. How the accident occurred was identified as "Petitioner was bending down to pick up a large case file," when she injured her left leg and knee.

On 9/1/10 petitioner presented to Dr. Johnson and reported that she was 95% improved. She stated that her left knee bothers her a little bit when she tries to wear heels.

On 10/13/10 petitioner returned to Dr. Johnson. She reported that she was doing about the same as her last visit. She complained of some aching in the knee. She noted no significant pain or swelling. She stated that she was walking 3-4 miles a day, up to 4 times a week. An examination revealed a knee nontender to palpation, no joint line tenderness, and full knee range of motion. Dr. Johnson's assessment was status post left knee arthroscopy and partial meniscectomy. Dr. Johnson released petitioner to work with no restrictions. He was of the opinion that petitioner had reached maximum medical improvement. Dr. Johnson released petitioner from his care.

On 1/31/11 the evidence deposition of Dr. Brent Johnson was taken on behalf of the petitioner. Dr. Johnson opined that the type of activity petitioner described as the mechanism of her injury did not involve any twisting or torque of her knee. He opined that a meniscal tear can occur if someone were reaching down to pick something up off the floor, even if they were not at work. He was of the opinion that bending down, bending the knee or twisting the knee is an activity that all of us do on a day to day basis from time to time. Dr. Johnson was of the opinion that at petitioner's age, it would be pretty uncommon that everyday day to day activities would cause a meniscus tear. Dr. Johnson admitted that petitioner has some evidence of Grade II chondromalacia in her left knee and some deterioration in her left knee.

On 5/4/11 petitioner returned to Dr. Johnson for follow-up of her left knee. She reported that she was doing much, much better. She reported that she was able to resume activities such as Body Pump without any pain or difficulty. An examination revealed no evidence of effusion. Range of motion was 4/0/135 degrees. She was nontender to palpation. Dr. Johnson assessed status post left knee arthroscopy and partial meniscectomy, and a resolved plica syndrome. Dr. Johnson continued petitioner's activities as tolerated. He continued her work without restrictions. He indicated that she was at maximum medical improvement and could follow up on as needed basis.

On 7/26/11 petitioner underwent a Section 12 examination performed by Dr. Richard Lehman. She gave a history of injuring her left knee on 5/24/10. She gave a history of working as a public defender. She reported that she was picking up a very large file, bent over to pull up and felt that her left knee ripped apart. In addition to an examination, Dr. Lehman performed a record review. Petitioner stated that she was injured while lifting a chart and felt that her knee tore apart at that time. Dr. Lehman reviewed the MRI and noted that there was no fluid on the knee. This lead him to believe that petitioner had a chronic degenerative tear of the medial meniscus based on the fact that the size and severity of the meniscus with no history of swelling in the knee at the time of the injury. Dr. Lehman reviewed x-rays of the left knee that showed mild degenerative changes on her knee. Following an examination Dr. Lehman's impression was that petitioner's symptoms continue to be somewhat problematic with grinding that had improved since the surgery. His diagnosis was a torn medial meniscus and mild degenerative joint disease patellofemoral articulation. He was of the opinion that her prognosis was good.

Dr. Lehman did not believe petitioner needed any further treatment. He was of the opinion she could work without restrictions. He did not believe her current problems were caused by her work related injury. Dr. Lehman was of the opinion that petitioner's meniscus tear was preexisting for a number of

reasons, the most being that she had a traumatic injury to her knee by her history and had absolutely no swelling in her knee the day after her injury. He also believed the patient had a horizontal cleavage tear which was characterized as degenerative on the petitioner's MRI, but horizontal cleavage tears and the type of tear that was identified, a large severe tear of the meniscus, if it were acute would have caused bleeding and without question would have had some swelling in the joint and some severity of inflammation in the joint, and this was not identified. Furthermore, Dr. Lehman was of the opinion that the petitioner had a similar pathological process in the right knee which was consistent with the same degenerative process in the knee. Based on these findings, Dr. Lehman felt it would be very difficult to state that she had an acute pathological process to her knee.

On 3/13/12 the evidence deposition of Dr. Lehman was taken on behalf of the respondent. Dr. Lehman opined that petitioner had no acute injury on 5/24/10. He also doubted her history that she had pain in her left knee on that day. He based this on the fact the MRI of the knee taken the next day showed no acute findings. Dr. Lehman was of the opinion that if petitioner bent with her knees to retrieve the file and had no rotational stress then he did not believe that that is a biomechanical mechanism that can hurt her knee. He did not believe petitioner had any rotational torque to her knee when she bent down. Dr. Johnson opined that it is not possible that petitioner had some preexisting degenerative change in the left knee that she further injured when bending over and lifting the file on 5/24/10.

Terry Ales was called as a witness on behalf of respondent. Ales is the secretary to Angela Madison, the attorney petitioner shares loft space with. Ales is not petitioner's secretary, but may do courtesy things for her such as answering phones and escorting clients to her office. Ales testified that on 5/24/10 she was working. Although she did not see the accident occur she did hear petitioner scream out in pain. She then turned around and saw petitioner come out of the office and petitioner told her that she hurt her left knee. Ales then went and got petitioner's client for her.

Since 5/24/10 petitioner can no longer run, snow ski or water ski. She stated that she is more cautious when she body pumps with weights. She has also modified her work wardrobe with respect to the height of her heel. Petitioner also testified that when she stands on concrete she has increased pain in her knee and it aches more at the end to the day. For her complaints she ices the knee and takes ibuprofen. Petitioner does do spinning, walking and playing with her kids.

C. DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT?

There are three categories of risk to which an employee may be exposed: (a) risks distinctly associated with the employment, (b) personal risks, and (c) neutral risks that have no particular employment or personal characteristics, Illinois Institute of Technology Research Institute v. Industrial Commission, 314 Ill.App.3d 149, 731 N.E.2d 795, 247 Ill.Dec. 22 (1st Dist. 2000). With regards to a neutral risk, the question of whether an injury arose out of the employment rests on a determination of whether the claimant was exposed to a risk of injury to a greater extent than that to which the general public was exposed.

In the case at bar, the petitioner gave various histories as to the mechanism of injury. The first history was to Dr. Wirth on 5/25/12. Dr. Wirth's records note "patient here for Lt knee pain hurt yesterday bending down to pick chart." On 6/7/10 petitioner presented to Dr. Johnson and reported that she was bending down to lift up a file out of her cabinet and felt a pop in her knee. On 7/24/10 petitioner filed her Application for Adjustment of Claim and identified the accident as "petitioner was bending down to pick up a large case file."

On 7/26/11, 14 months after the incident, petitioner's accident history changed slightly. Petitioner reported to Dr. Lehman that she bent over to pull up a large file and felt that her left knee ripped apart. Petitioner also stated she was injured while lifting a chart and felt that her knee tore apart at that time. Then at trial on 7/24/12 petitioner initially testified that when she bent down to get a file out of the bottom filing cabinet she felt her knee rip and pop. Then after further questioning by her attorney petitioner provided a slightly different history. She testified that she squatted down and was pulling the file out of the filing cabinet when she felt the pain in her left knee. She testified that she felt the pain in the squat position and in the process of pulling out the file. None of the histories petitioner provided included any twisting or torque of the left knee.

It is also important to note that prior to this accident petitioner had a history in late December of 2009 of significant joint pain in both her elbows and knees. She was assessed with joint pain of multiple joints. Petitioner was also found to have evidence of preexisting Grade II chondromalacia and deterioration in her left knee.

Given these multiple accident histories, the arbitrator finds the histories most contemporaneous to the incident the most credible. The arbitrator finds that over time, accident histories often change to conform to the proof necessary to find a case compensable.

In the case at bar, the very first documented history of the accident given the day after the incident is that petitioner hurt her left knee bending down to pick chart. There is no reference, at that point, to petitioner actually getting to the point of lifting the chart. Again on 6/7/10 she reported that she felt a pop in her knee while bending down to lift up a file out of her cabinet. Again, the injury is reported as occurring when she was bending and there is no indication that the injury occurred while she was squatting down and pulling the file out of the cabinet. Even her Application for Adjustment of Claim states that she was injured as she was bending down to pick up large case file. None of these histories support a finding other than that the injury occurred when petitioner bent down to get the file. There is nothing in these accident histories to suggest that petitioner was already down and in the process of pulling out the case file when the pop and pain occurred.

It is not until 14 months after the incident when petitioner presents to respondent's examining physician that her accident history changed slightly. Petitioner initially gave a history of bending over to pull up a large file and felt that her left knee ripped apart. This history is consistent with the prior accident histories which support a finding that the rip and pop occurred as she was bending down. Petitioner then went on and stated that she injured herself while lifting a chart. This is the first time petitioner made any mention that the injury did not occur until after she was in the process of lifting the file. At trial, petitioner also gave inconsistent accident histories. She initially testified that when she bent down to get a file out of the bottom filing cabinet she felt her knee rip and pop. It was not until after further questioning by her attorney that her accident history again changed to reflect that she did not feel the pain in her left knee until after she had squatted down and was pulling the file out of the filing cabinet. The arbitrator finds that if this was in fact what had occurred there is no reason that petitioner could not have provided this history to the healthcare providers she saw most contemporaneous to the injury.

Based on the above, the arbitrator finds the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10. The arbitrator finds the credible evidence supports a finding that the "rip and tear" of petitioner's left knee occurred as she was simply bending down to retrieve a file from the filing cabinet. The arbitrator reasonably infers from the credible evidence that the petitioner had not twisted or torqued her left knee as she squatted and had not yet reached for or pulled the case file until after she felt the rip and tear in her knee.

Given the finding that the rip and tear of petitioner's knee occurred when petitioner simply squatted, the arbitrator finds the petitioner was not exposed to a risk of injury to a greater extent than that to which the general public was exposed. Petitioner provided no evidence to support a finding that she had anything in her hands when she was squatting, or that her knee twisted when she was squatting, or that she had to squat more times than the general public due to her work activities. There is nothing in the evidence to suggest any other finding than that the petitioner sustained her left knee injury while she was bending down. The arbitrator finds this is a risk the general public is exposed to many times a day. The arbitrator also notes that there is evidence in the credible medical records that show petitioner had preexisting degenerative problems with her left knee for which she received treatment as recently as 6 months prior to the incident.

F. IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY?
J. WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES?
L. WHAT IS THE NATURE AND EXTENT OF THE INJURY?

Having found the petitioner has failed to prove by a preponderance of the credible evidence that she sustained an accidental injury that arose out of and in the course of her employment by respondent on 5/24/10 the arbitrator finds these remaining issues moot.